No. 91-933

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST, JOSEPH P. CONNORS, SR., DONALD E. PIERCE, JR., WILLIAM MILLER, WILLIAM B. JORDAN and PAUL R. DEAN, as Trustees of the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,

Petitioners,

v.

LTV STEEL COMPANY, INC., BCNR MINING CORPORATION, NEMACOLIN MINES CORPORATION, and TUSCALOOSA ENERGY CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Retiree Benefits Bankruptcy Protection Act of 1988 protects *all* retirees' health benefits during a chapter 11 reorganization of their former employer, or, as the court of appeals held, protects only those benefits that the employer would be legally obligated to pay even if the Act did not exist.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners seek review of the decision of the United States Court of Appeals for the Second Circuit in this case, affirming a decision of the United States District Court for the Southern District of New York and holding that respondents, companies in chapter 11 bankruptcy, are not required to pay their retirees' health benefits throughout the reorganization proceeding, notwithstanding the Retiree Benefits Bankruptcy Protection Act of 1988.

OPINIONS BELOW

The opinion of the court of appeals holding respondents free to terminate retiree benefits (App., *infra*, at 1a-19a) is reported at 945 F.2d 1205. Previous opinions of the court of appeals concerning jurisdictional issues (App., *infra*, at 20a-23a and 24a-35a) are reported at 928 F.2d 63 and 922 F.2d 86. The opinion of the district court (App., *infra*, at 36a-55a) is reported at 111 B.R. 399.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610, amended Section 608 of Pub. L. No. 99-591, 100 Stat. 3341-74 (1986), to provide, in pertinent part:

> (a)(1) Subject to paragraphs (2), (3), (4), and (5), and notwithstanding title 11 of the United States Code, the trustee shall pay benefits to retired former employees under a plan, fund, or program maintained or established by the debtor prior to filing a petition (through the purchase of insurance or otherwise) for the purpose of providing medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death.
>
> (2) The level of benefits required to be paid by this subsection may be modified prior to confirmation of a plan under section 1129 of such title if—
>
> > (A) the trustee and an authorized representative of the former employees with respect to whom such benefits are payable agree to the modification of such benefit payments; or
> >
> > (B) the court finds that a modification proposed by the trustee meets the standards of

section 1113(b)(1)(A) of such title and the balance of the equities clearly favors the modification.

If such benefits are covered by a collective bargaining agreement, the authorized representative shall be the labor organization that is signatory to such collective bargaining agreement unless there is a conflict of interest.

(3) The trustee shall pay benefits in accordance with this subsection until—

(A) the dismissal of the case involved; or

(B) the effective date of a plan confirmed under section 1129 of such title which provides for the continued payment after confirmation of the plan of all such benefits at the level established under paragraph (2) of this subsection, at any time prior to the confirmation of the plan, for the duration of the period the debtor (as defined in such title) has obligated itself to provide such benefits.

(4) No such benefits paid between the filing of a petition in a case covered by this section and the time a plan confirmed under section 1129 of such title with respect to such case becomes effective shall be deducted or offset from the amount allowed as claims for any benefits which remain unpaid, or from the amount to be paid under the plan with respect to such claims for unpaid benefits, whether such claims for unpaid benefits are based upon or arise from a right to future benefits or from any benefit not paid as a result of modifications allowed pursuant to this section.

(5) No claim for benefits covered by this section shall be limited by section 502(b)(7) of such title.

* * * *

(c) This section is effective with respect to cases commenced under chapter 11, of title 11, United States Code, in which a plan for reorganization has not been confirmed by the court and in which any such benefit is still being paid on October 2, 1986, and in cases that become subject to chapter 11, title 11, United States Code, after October 2, 1986 and before the date of the enactment of the Retiree Benefits Bankruptcy Protection Act of 1988.

STATEMENT

The court of appeals in this case held that the Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 ("BPA" or "Benefit Protection Act"), gives no protection to the health benefits of retirees of an employer in chapter 11 reorganization unless the retirees have a legally enforceable contractual or other right to those benefits outside of bankruptcy. Petitioners seek review of that ruling.

A. Statutory and Factual Background

On July 17, 1986, LTV Steel Company and several of its mining subsidiaries (collectively, "LTV"), respondents here, filed for reorganization under chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq.*, in the United States Bankruptcy Court for the Southern District of New York. As one of its first acts, LTV immediately announced that it would no longer pay health benefits to its approximately 78,000 retired employees. On July 30, 1986, after a steelworkers' strike at a profitable LTV plant (and hours after the Senate took action to restore benefits, *see infra*), LTV sought and obtained authorization from the bankruptcy court to continue paying retiree health benefits. App., *infra*, at 87a; S. Rep. No. 119, 100th Cong., 2d Sess. 2 (1987).

Among the retirees, many received benefits under programs terminable at will by LTV. But some 900 coalmining retirees, and their families, received benefits

under a collective bargaining agreement, the National Bituminous Coal Wage Agreement of 1984. Under that Agreement, LTV was responsible for providing health benefits to covered retirees, through employer-sponsored plans, at levels specified by the United Mine Workers of America 1974 Benefit Plan and Trust, which was established in 1974 and continued through successive collective bargaining agreements. The 1974 Trust, petitioner here, undertook to provide benefits to those retirees whose last employers were no longer in business or no longer signatories to a coal wage agreement (and no longer providing benefits). The 1984 Wage Agreement had an expiration date of January 31, 1988. App., *infra*, at 86a.[1]

Congress stepped in to address LTV's action immediately after the July 17, 1986, bankruptcy filing. On July 28, the Judiciary Committee of the United States Senate conducted a hearing on LTV's cutoff of retiree health benefits. Two days later, the Senate passed a bill ordering LTV to reinstate those benefits which LTV provided to retirees under agreements. S. Rep. No. 119, *supra*, at 2; S. 2690, 99th Cong., 2d Sess. (1986); 132 Cong. Rec.

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[1] LTV terminated these contractual benefits in 1986 even though Section 1113 of the Bankruptcy Code bars the unilateral rejection of collective bargaining agreements. That provision—enacted in 1984 in response to this Court's decision in *NLRB v. Bildisco and Bildisco*, 465 U.S. 513 (1984)—sets forth specific procedural and substantive standards that must be met before a collective bargaining agreement is repudiated in chapter 11, thus modifying the general authority of a trustee, under Section 365, to assume or reject executory contracts. LTV took the position that retirement benefits under collective bargaining agreements were not covered by Section 1113, and hence could be terminated, because the benefits of retirees (unlike the benefits paid to current employees) derived from their *pre*-petition labor for LTV. According to LTV, such benefits were not part of an *executory* contract and therefore were outside the scope of Section 1113. *See Retiree Benefits in Bankruptcy: Oversight Hearing Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 96-99 (1986).

18,099 (1986). The House commenced hearings the following week and, on September 29, passed a bill that protected union retiree benefits by expressly including them within the protection of collective bargaining agreements provided by 11 U.S.C. § 1113. *See* S. Rep. No. 119, *supra*, at 2; H.R. 5490, 99th Cong., 2d Sess. (1986); 132 Cong. Rec. 26,981 (1986); H.R. Rep. No. 917, 99th Cong., 2d Sess. (1986).

These bills were quickly replaced by a measure that was broader in its scope—covering all health benefits, not just those provided under collective-bargaining or other agreements—though only temporary in its effect. Thus, Congress enacted a stopgap measure to give itself time to deal thoroughly with the issue. Section 608(a) of the October 30 Joint Resolution Making Continuing Appropriations for the Fiscal Year 1987 and for Other Purposes, Pub. L. No. 99-591, 100 Stat. 3341-74 (1986) [hereafter "1986 Act"], stated:

> Notwithstanding any provision of chapter 11 of title 11, United States Code, the trustee shall pay benefits until May 15, 1987 to retired former employees under a plan, fund, or program maintained or established by the debtor prior to filing a petition (through the purchase of insurance or otherwise) for the purpose of providing medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death.

The provision was made applicable to pending chapter 11 cases, such as the present case, in which benefits were being paid on October 2, 1986, as well as to cases brought under chapter 11 after October 2, 1986. *Id.* § 608(b).[2]

After thus preserving the status quo, Congress continued its consideration of the problem of retiree health

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[2] This provision and subsequent provisions on this subject govern the conduct of a debtor-in-possession as well as a trustee in chapter 11. *See* 11 U.S.C. § 1107 (giving debtor-in-possession same rights, functions, and duties as trustee, with exceptions not relevant here).

benefits in chapter 11 cases. *See* S. Rep. No. 119, *supra*, at 2-3. During this process, it twice extended the stopgap law—first to September 15, 1987 (Pub. L. No. 100-41, 101 Stat. 309 (May 15, 1987)), then to October 15, 1987 (Pub. L. No. 100-99, 101 Stat. 716 (Aug. 18, 1987)). Congress finally enacted permanent legislation in 1988, based on the Senate bill sponsored by Senators Metzenbaum, Heinz, and others, S. 548, 100th Cong., 1st Sess. *See* S. Rep. No. 119, *supra* (Committee Report on S. 548). On June 16, 1988, the bill became law, as the Retiree Benefits Bankruptcy Protection Act of 1988.

In pertinent part, the Act made permanent the stopgap measures' protection of retirees' health benefits during the pendency of chapter 11 cases like LTV's case, amending Section 608(a) of the 1986 Act to provide that health benefits paid before the bankruptcy filing must generally continue throughout the proceeding:

> (1) Subject to paragraphs (2), (3), (4), and (5), and notwithstanding title 11 of the United States Code, the trustee shall pay benefits to retired former employees under a plan, fund, or program maintained or established by the debtor prior to filing a petition (through the purchase of insurance or otherwise) for the purpose of providing medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death.

Paragraph (2) of the amended Section 608(a) allowed modification of benefit payments only upon agreement by the retirees or certain court findings. Paragraph (3) commanded continuation of benefits until either the case is dismissed or a reorganization plan is confirmed and takes effect, as long as the reorganization plan provides for continued benefits "for the duration of the period the debtor . . . has obligated itself to provide such benefits."[3]

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[3] Those provisions, contained in BPA § 3, applied to any case pending before June 16, 1988, the BPA's effective date. Substantively identical provisions, contained in BPA § 2, were added to the permanent Bankruptcy Code, in a new Section 1114 and in Section

B. Proceedings Below

One week after enactment of the BPA, LTV filed a complaint to initiate an adversary proceeding in this bankruptcy case, asking for a declaratory judgment that the BPA did not require LTV to pay health benefits to its approximately 900 retirees and a similar number of spouses and dependents covered by the 1984 Wage Agreement after January 31, 1988, when that Agreement expired. In early August, the bankruptcy court agreed with LTV and granted partial summary judgment to that effect. App., *infra*, at 85a-87a. The court also ruled that the 1974 Benefit Trust, petitioner here, was now responsible for the benefits. *Id.* at 100a. LTV ceased paying these benefits on August 4, 1988.[4] LTV has continued paying health benefits to retirees under plans that LTV could have terminated at will. *See* Ct. App. Br. of Plaintiffs-Appellees at 23 n.*.

The district court affirmed. App., *infra*, at 54a-55a. Without mention of the words of the BPA's substantive provisions, the court relied entirely on two statements from the legislative history. *Id.* at 44a-45a. Although neither of the quoted statements says that the BPA protects only retiree benefits that the employer is otherwise legally bound to pay, the district court stated that Congress did not intend the BPA to "require debtors to pay retiree health benefits even when there is no obligation to do so." *Id.* at 44a. The court then reformulated its conclusion more narrowly, again without reference to the text of the BPA: the court concluded that Congress intended the BPA to prevent only "the unilateral termination or modification" of retiree benefits. *Ibid.* Since expiration of a contract was not a unilateral termination, the court held, LTV was free to cease paying benefits. *Ibid.*

1129, to apply to cases filed on or after June 16, 1988. *See* notes 7, 8, *infra*.

[4] The 1974 Benefit Trust has paid them since that date, paying out approximately $400,000 per month. Ct. App. Jt. App. 833-34, 837.

The court of appeals, by a divided vote, affirmed the district court's ruling. App., *infra*, at 1a-19a.[5] The court refused to adopt LTV's argument, reflected in the district court opinion, that the BPA's protection turns on whether the benefit termination is unilateral—so that, according to LTV, benefits provided by an employer under a non-contractual program, terminable by the employer at will, *were* protected by the BPA. Ct. App. Br. of Plaintiffs-Appellees 23 n.*. Instead, the court of appeals adopted a more sweeping and severe limitation on the BPA's coverage, concluding that the Act protects in chapter 11 only those retiree health benefits that are legally enforceable outside the bankruptcy proceeding. App., *infra*, at 9a, 12a.

The court based its conclusion on the BPA's language requiring continued payments "under a plan, fund, or program maintained or established by the debtor prior to filing a petition" for bankruptcy. The court read those words to protect benefits only "according to" or "in conformity with" the legal obligations created by the pre-petition plan (App., *infra*, at 13a), so that benefits would be unprotected under the BPA if and when they were legally unprotected under the pre-petition plan. The bulk of the court's opinion was addressed, not to the meaning of the BPA, but to the meaning of the 1984 Wage Agreement, which the court found to relieve LTV of benefit obligations upon its expiration on January 31, 1988. *Id.* at 5a-11a. Except for simply asserting its reading of the BPA's language (*id.* at 4a-5a), the court of appeals' opinion includes only one paragraph on the statute's meaning (*id.* at 11a-12a). That paragraph relies wholly on statements from the legislative history indicating that the Act would prohibit an employer's use of chapter 11 to cease paying retirement benefits under pre-petition agree-

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[5] The court of appeals initially sent the case back for certification of the partial summary judgment under Fed. R. Civ. P. 54(b). App., *infra*, at 20a-35a.

ments (though none of the quoted statements *limits* the BPA's reach to such benefits). *See ibid.*

The dissenting judge read the language of the BPA quite plainly to require continued payment during the chapter 11 proceeding of *any* pre-petition retiree health benefits, unless the specific BPA provisions for modification (by post-petition agreement or court order) were properly invoked (which they were not in this case). App., *infra*, at 14a, 18a. The dissent observed that the BPA nowhere refers to "unilateral" terminations and that the language and legislative history show that the BPA protects *all* retirees, whether or not covered by collective bargaining agreements. *Id.* at 17a. That protection, the dissent explained, serves the BPA's purpose of freezing all retiree health benefits on an interim basis, while the parties and the bankruptcy court seek to resolve the future level of benefits. *Id.* at 18a. And that purpose is specifically demonstrated in this particular context, the dissent noted, by the only passage from the legislative history that explicitly addresses the expiration of a collective bargaining agreement: Senator Metzenbaum, the BPA's chief sponsor, stated that benefits must continue, absent the parties' agreement or judicial modification, " 'even after the termination of a collective bargaining agreement.' " *Id.* at 17a.

REASONS FOR GRANTING THE PETITION

This case presents an important issue of statutory interpretation under the Bankruptcy Code. The court of appeals held that the Benefit Protection Act gave protection to the health benefits of retirees during a chapter 11 reorganization proceeding only to the extent that such benefits were contractually enforceable under a pre-petition collective bargaining agrement. More generally, the court held that if and when there is no legal entitlement to the benefits outside the bankruptcy, the BPA's guarantee of continued benefits in bankruptcy does not apply. That ruling is wrong and should be reviewed.

The ruling is inconsistent with Congress's unmistakable intent, clearly embodied in the language of the statute, to ensure that retirees' pre-petition health benefits generally remain in place during the entire pendency of a chapter 11 proceeding, regardless of their non-bankruptcy contractual or other legal entitlement to continuing benefits. That guarantee is subject to two, and only two, exceptions: benefits may be changed if, *during* the bankruptcy proceeding, either the retirees agree to a reduction or the bankruptcy court finds that such a reduction is necessitated by the financial condition of the bankrupt company. In nevertheless allowing benefit termination where neither exception applies, the court of appeals adopted a reading of the BPA that is not only contrary to LTV's own reading but that substantially guts the statute of its intended protections. If allowed to stand, the ruling will place in immediate jeopardy the health benefits of large numbers of retirees whose employers are or will be in reorganization under chapter 11—precisely the result that Congress wanted to avoid by enacting the BPA.

A. The Decision Below Strips Retirees of the Protection Congress Plainly Provided in the Retiree Benefits Bankruptcy Protection Act.

1. The BPA provides that, when a company files for reorganization under chapter 11, "the trustee shall pay benefits to retired former employees under a plan, fund,

or program maintained or established by the debtor prior to the filing of a petition." 1986 Act, § 608(a)(1), as amended by BPA. That language has a plain and unequivocal meaning: if health benefits are being paid to retirees prior to the filing of a chapter 11 petition, they must continue to be paid during the pendency of the entire chapter 11 proceedings. Nothing is said about the basis—contract, statutory duty, voluntary act of employer—on which the benefits are paid: *any* plan, fund, or program is covered.

The Act goes on to create two exceptions to this categorical requirement. Pre-petition benefits can be modified when either of two events occurs during the bankruptcy proceeding: (1) the "trustee" and "authorized representative" of the retirees "agree to the modification of such benefit payments"; or (2) "the court finds that a modification proposed by the trustee" is appropriate under the specific criteria set forth in the statute. 1986 Act, § 608(a)(2), as added by BPA.[6] The Benefit Protection Act does not allow any other basis for denying a retiree health benefits that he or she was receiving prior to the chapter 11 filing. On the contrary, the pertinent Senate Report states that the BPA "makes it clear that when a Chapter 11 petition is filed retiree benefit payments must be continued without change until and unless a modification is agreed to by the parties or ordered by the court." S. Rep. No. 119, *supra*, at 5. The Report adds that the Act "*rejects any other basis* for trustees to cease or

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[6] These events can occur only during the bankruptcy because there is no trustee before or after the proceeding. A court-ordered modification is permitted if it meets "the standards of section 1113(b)(1)(A)" of the Bankruptcy Code (requiring that the modification be "necessary to permit the reorganization" and be fair and equitable to all parties, 11 U.S.C. § 1113(b)(1)(A)) and "the balance of the equities clearly favors the modification." 1986 Act, § 608(a)(2)(B), as added by BPA.

modify retiree benefit payments." *Ibid.* (emphasis added).[7]

In this case, of course, neither of the two bases for modifying retiree benefits is present. Therefore, the BPA commands quite simply that the trustee (or, here, LTV

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[7] Although this case involves the provisions of the BPA that apply to cases pending on the date of its enactment (BPA, § 3), the same command to continue benefits, subject to the same limited exceptions, appears in the permanent BPA provisions, now codified principally at 11 U.S.C. § 1114 (BPA, § 2). Thus, Section 1114 (e)(1) states:

> Notwithstanding any other provision of this title, *the debtor in possession, or the trustee* if one has been appointed under the provisions of this chapter (hereinafter in this section "trustee" shall include a debtor in possession), *shall timely pay and shall not modify any retiree benefits*, except that—
>
> (A) the court, on motion of the trustee or authorized representative, and after notice and a hearing, may order modification of such payments, pursuant to the provisions of subsections (g) and (h) of this section, or
>
> (B) the trustee and the authorized representative of the recipients of those benefits may agree to modification of such payments,
>
> after which such benefits as modified shall continue to be paid by the trustee.

(Emphasis added.) (The standards set forth in subsection (g) and (h) are substantively the same as those in § 1113(b)(1)(A). *See* note 6, *supra.*) Section 1114 earlier defines "retiree benefits," in subsection (a), to mean any

> payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death *under any plan, fund, or program* (through the purchase of insurance or otherwise) *maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.*

(Emphasis added.)

In short, the statutory question presented in this case covers the permanent provisions (Section 1114, Section 1129(a)(13)) as well as the transitional provisions of the BPA.

as the debtor-in-possession) continue paying retirement benefits during the chapter 11 proceeding.

2. The court of appeals in this case nevertheless ruled that the statute provides an additional basis for the trustee to cease paying retiree benefits, concluding that a retiree's benefits could be terminated at any time during a chapter 11 proceeding if the company was not under a pre-existing contractual or other legal obligation to continue paying benefits. The court reached that conclusion by reading the statutory language providing that benefits shall be paid "under a plan, fund, or program maintained or established" prior to bankruptcy to mean that benefits shall be paid only "according to" or "in conformity with" those terms and conditions of a pre-petition plan, fund, or program that were legally enforceable outside bankruptcy. App., *infra*, at 9a, 13a. But, as already indicated, no such limitation appears in the text of the BPA. And the Second Circuit's conclusion is demonstrably at odds with what Congress wrote and intended in the BPA—as, in fact, LTV has agreed throughout this proceeding.

First, LTV itself has repudiated the court of appeals' reading—a point that is of particular importance in light of the facts that (a) the BPA was enacted with LTV specifically in mind and (b) LTV was deeply involved in the legislative proceedings. Thus, LTV has always recognized that the legislation was not limited to retirees with pre-petition legal rights to benefits. LTV has continued to this day to pay benefits for its *non*-union retirees, even though, as LTV itself put it in the Second Circuit, those individuals receive benefits under "corporate policies and programs *terminable at will by LTV outside of bankruptcy*." Ct. App. Br. for Plaintiffs-Appellees at 23 n.* (emphasis added). Indeed, LTV expressly acknowledged in the court below that "[t]he Bankruptcy Protection Act *bars* the unilateral modification or termination of such [at will] benefits by LTV." *Ibid.* (emphasis added). That position directly contradicts the Second

Circuit's ruling that the BPA has no application to benefits unless they are legally enforceable outside bankruptcy.

Second, the text of the BPA itself undermines the Second Circuit's view. The "plan[s], fund[s] or program[s]" that must continue are nowhere limited to those giving legally enforceable benefit rights. Moreover, the Act sets forth the only two ways for modifying the otherwise absolute command to the trustee to continue paying benefits (post-petition agreement or court order); not included among those grounds for cessation of benefits is the lapsing of plan legal obligations. Likewise, the Act commands payment of benefits until either the case is dismissed or a reorganization plan is confirmed; not included as a termination date is the expiration date of a collective bargaining agreement.

In addition, the Act clearly demonstrates that when Congress wanted to limit a company's responsibility for retiree benefits to its pre-bankruptcy legal obligations, Congress knew how to do so and explicitly said as much. Thus, Congress provided in the BPA that, *after* a reorganization plan is *confirmed* under chapter 11, retiree benefits need be paid only "for the duration of the period the *debtor . . . has obligated itself to provide* such benefits." 1986 Act, § 608(a)(3)(B), as added by BPA (emphasis added).[8] The omission of that explicit language in the section of the same statute dealing with the debtor's obligation *during* a chapter 11 proceeding demonstrates that Congress did not implicitly intend to adopt the same contractual, durational limit in that context merely by using the words "under a plan, fund, or program."

Third, the origins of the statutory phrase "under a plan, fund, or program" also show that Congress meant to include any pre-petition benefit scheme, whether or not retirees had legally enforceable rights to its continuation.

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[8] The same language is contained in 11 U.S.C. § 1129(a)(13), the permanent BPA addition to the Code that completes the scheme of 11 U.S.C. § 1114. *See* BPA, § 2(b).

The phrase had its genesis in the stopgap measure that Congress enacted immediately upon LTV's abrupt termination of its retirees' benefits in 1986. 1986 Act, § 608(a). The stopgap provision declared: "the trustee shall pay benefits until May 15, 1987 to retired former employees *under a plan, fund, or program maintained or established* by the debtor prior to filing a *petition* [under chapter 11] . . . ." (Emphasis added.) Congress expressly applied the provision to any pending chapter 11 case "in which *any such benefit is still being paid* on October 2, 1986." *Id.* § 608(b) (emphasis added).

This stopgap legislation was designed with "the express purpose of 'freezing' the *status quo*," as President Reagan later explained (23 Weekly Comp. of Pres. Doc'ts 536 (May 18, 1987)), so that Congress could fashion a comprehensive response. It is not possible to suggest that, by using the phrase "under a plan, fund, or program," Congress allowed a chapter 11 debtor like LTV to terminate, during the stopgap period, any benefits "still being paid on October 2, 1986" that it was not legally obligated to continue paying. On the contrary, as Senator Heinz, a sponsor of the stopgap legislation explained, its purpose was to ensure that LTV will "continue to pay its health benefits to *all* retirees until May 15, 1987. This will ensure that LTV retirees and retirees of other companies in bankruptcy will continue to receive their health benefits until we can return in the next Congress and resolve the broader issue." 132 Cong. Rec. 28,382 (1986) (emphasis added). There is no basis for suggesting that the identical words "under a plan, fund, or program" meant something different when Congress did "resolve the broader issue" by passing the BPA. Those words, in short, refer to any benefits that were being paid prior to bankruptcy, regardless of whether the company was legally required to pay them before or during a chapter 11 proceeding.[9]

[9] The BPA's language—"plan, fund, or program maintained or established . . ."—derives almost verbatim from the definition of "employee welfare benefit plan" set forth in section 3(1) of

Fourth, the Second Circuit's misreading of the statutory language is confirmed by the general background against which the statute was enacted and its legislative history. Congress has long been aware that employee and retiree health benefits most often are *not* contractually protected; it has, in fact, considered legislation addressed to that issue on several occasions throughout the past decade.[10] Thus, when Congress enacted the stopgap legislation and the BPA, it knew that a substantial portion of LTV's and other companies' retirees (those not covered by a collective bargaining agreement) had no contractual protection at all. Nevertheless, as the statutory language and legislative history make absolutely clear, Congress chose to include those retirees under the statute and to ensure them benefit protection during the pendency of a chapter 11 proceeding.

The issue of contractual protection for employee and retiree benefits has been a part of Congress's legislative agenda at least since it considered and enacted the ERISA statute almost two decades ago. In that statute, Congress explicitly decided not to grant contractual (or "vesting") protection to health and other welfare benefits, while granting such protection to *pension* benefits. *See*,

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ERISA, 29 U.S.C. § 1002(1). The ERISA definition has been construed to encompass essentially all arrangements under which an employer provides benefits to its employees or retirees. *E.g.*, *Donovan v. Dillingham*, 688 F.2d 1367, 1372-73 (11th Cir. 1982) (*en banc*); *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320, 324-26 (2d Cir. 1985), *summarily aff'd*, 477 U.S. 901 (1986) (employer's severance pay policy is an "'employee welfare benefit plan'" under section 3(1) of ERISA); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1355 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985) (employer's "secret severance pay policy" is an employee welfare benefit plan).

[10] *See, e.g.*, Consolidated Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272, 100 Stat. 82 (requiring employers to continue health care benefits for certain former employees); S. 1265 and H.R. 2508, 100th Cong., 1st Sess. (1987) (requiring employers to provide health insurance); S. 2199 and H.R. 4134, 101st Cong., 2d Sess. (1990) (providing tax incentives for employers to pre-fund retiree health plans).

e.g., *Adams v. Avondale Indus., Inc.*, 905 F.2d 943 (6th Cir.), *cert. denied*, 111 S. Ct. 517 (1990) ("[a]lthough Congress considered imposing vesting requirements on welfare [including health] benefits, it decided to limit vesting to pension plans") (citing S. Rep. No. 383, 93d Cong., 2d Sess. 18 (1974)). *See also* Note, *Unfunded Vacation Benefits: Determining the Scope of ERISA*, 87 Colum. L. Rev. 1702, 1715 (1987). As a result of this distinction in statutory treatment, health benefits of employees and retirees are normally provided by employers on an at-will basis, except where they are protected by a collective bargaining agreement. Congress has long been aware of this lack of protection. *See, e.g.*, note 10, *supra; Retiree Health Benefits: The Fair-Weather Promise?* at ii, 4-7, 12, 14 (Aug. 7, 1986) (Staff Report of the Senate Special Committee on Aging, preface by Sen. Heinz, chairman) (discussing lack of protection in context of LTV actions).[11]

The plans for LTV's retirees followed this general pattern. Thousands of LTV's retirees (*i.e.*, those not covered by collective bargaining agreements) received their health benefits under programs that allowed the company to terminate them at will. *See* S. Rep. No. 119, *supra*, at 2, 4-5; 132 Cong. Rec. 18,100 (1986). Thus, to have ex-

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[11] *See Retiree Benefits in Bankruptcy Oversight Hearing, supra*, at 47-48, 67-68; *Retiree Benefits Security Act of 1987: Hearings on S. 548 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 215 (1987) (many employees have no more than "month-to-month promise" by employers to pay health benefits).

Extensive case law recognizes this fact. *See, e.g., Musto v. American Gen. Corp.*, 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989) (employer may increase premiums payable by retirees where employer retained right to amend group insurance policy); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 491-92 (2d Cir. 1988) (employer is free to reduce medical benefits where no contractual obligation prohibits the exercise of the employer's reserved power); *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1516-17 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989) (employer did not promise "lifetime" health benefits to union

cluded from the BPA all benefits not guaranteed by contract would have meant excluding from protection a substantial share of LTV's 78,000 retirees (and numerous other reorganizing companies' retirees).

Not surprisingly, it is clear that Congress intended no such gaping exclusion in the protection it was providing. The statute itself plainly contemplates that the benefits protected by its provisions include those not covered by a collective bargaining agreement: not only is there no statutory language limiting the BPA to union retirees, but the BPA provision allowing modification upon agreement or court order confirms that *all* benefits are covered when it identifies the authorized representative of retirees for the special case of union retirees—"[*i*]*f* such benefits are covered by a collective bargaining agreement." 1986 Act, § 608(a)(2), as amended by BPA § 3 (emphasis added); *see also* 11 U.S.C. § 1114(b)(i) (expressly referring to benefits "not covered by [a collective bargaining] agreement"). And the legislative history confirms this coverage for non-union retirees, who generally have no legal right to continued benefits.

Indeed, at the outset of the legislative process, bills were introduced that *would* have limited retiree protection to benefits established by a collective bargaining agreement. H.R. 5490, S. 2806, 99th Cong., 2d Sess. (1986).[12] *See also* H.R. 5276, H.R. 5283, and S. 2690, 99th Cong., 2d Sess. (1986) (reprinted in App., *infra*, 125a-128a) (S. 2690: LTV "shall continue to pay all medical and life in-

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retirees and was free to terminate benefits); *In re White Farm Equip. Co.*, 788 F.2d 1186 (6th Cir. 1986) (retirees' right to continued health benefits exists only where contract so provides); *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) (same); *Turner v. Local Union No. 302, International Brotherhood of Teamsters*, 604 F.2d 1219 (9th Cir. 1979) (same).

[12] These proposals would have amended 11 U.S.C. § 1113 to make clear that the protection for labor contracts in that provision extended to the retirement benefits portions of such contracts.

surance benefits . . ., as such payments are provided to be paid by such corporation *pursuant to any agreement in which such corporation . . . is a party*") (emphasis added). But Congress specifically rejected that narrower approach, opting instead for a statute that would provide full protection to *all* retirees. As Senator Heinz, a co-sponsor of the bill, explained, the Benefit Protection Act "extend[s] the protections we believe are there for benefits under a collective bargaining agreement to the benefits of non-union retirees." *See also* 134 Cong. Rec. 12,698 (1988) (Sen. Metzenbaum) ("[t]he benefits subject to the[] standards [of the BPA] are not required to arise from a collective bargaining agreement"); 133 Cong. Rec. 21,099 (1987) (Sen. Heflin) ("This legislation protects retired employees who are covered by a collective bargaining agreement, as well as those where no collective bargaining agreement is in effect").[13]

Finally, the legislative history contains one statement that specifically addresses the particular example of benefits not legally protected by any non-bankruptcy entitlement that is presented here. Senator Metzenbaum, the chief sponsor of the statute, expressly stated that a company in chapter 11 is required "to continue paying for these benefits *even after the termination of a collective bargaining agreement.*" *Retiree Benefits Security Act of 1987 Hearings*, *supra*, at 14 (emphasis added).[14] The court of appeals' view of the BPA thus limits retiree protections in ways contrary to Congress's plain intent.

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[13] *See also Retiree Benefits Security Act of 1987 Hearings*, *supra*, at 91, 96 (union testimony that proposed law would treat "exactly the same" the benefits of union employees under a collective bargaining agreement and the benefits of non-union employees subject to "unilateral modification by employers").

[14] The fact that several Members of Congress said that the BPA *would* protect legally enforceable benefits (*see* App., *infra*, at 12a; *id.* at 15a, quoting Sen. Byrd) does not, of course, mean that the BPA's protection is *limited* to such benefits. The statutory language and history noted in text above prove, to the contrary, that the Act covers *all* retirees' benefits.

3. In the courts below, LTV, while disavowing the reading of the BPA ultimately adopted by the court of appeals, sought to prevail on a different ground. LTV argued that the BPA prohibits only a "*unilateral* modification or termination of [retiree health] benefits" (Br. at 23 n.* (emphasis added); *see also* Br. 20-24) and, therefore, that the BPA did not apply in this case because the retirees' benefits lapsed as a result of the termination of a collective bargaining agreement, which was *not* a unilateral action by LTV. Under this theory, Congress wanted to protect throughout the bankruptcy proceeding the benefits of retirees who had *no* pre-existing legal rights to such benefits, while *limiting* its protection for union retirees who had legal rights under a collective bargaining agreement (allegedly limiting protection to the termination date of the agreement). But that, of course, is not the position taken by the Second Circuit, and it is, in any event, plainly an improper reading of the statute, as the Second Circuit tacitly concluded in rejecting it.

To begin with, LTV's position has no basis whatever in the statutory language, as LTV itself recognized in the court of appeals.[15] Nothing in the statute speaks of "unilateral" terminations[16]; and nothing in the Act makes a *pre*-petition agreement by a union relevant to termination of benefits. Only a *post*-petition agreement or judicial finding can alter the benefits. Indeed, it would be ludi-

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[15] LTV's entire analysis of the BPA issue in the court of appeals consisted of five pages (20-24) in its brief. Nothing in that analysis ties LTV's theory to the statutory language. Indeed, LTV caps its argument by citing cases, leading with *The Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892), for the proposition that the statutory language should be ignored when it produces an "unreasonable result." Br. 24.

[16] The term "unilateral" does, by contrast, appear in Section 1113(f), which bars a trustee from "unilaterally" altering or terminating any provision of a collective bargaining agreement without complying with Section 1113. (That provision has been construed to cover terminations by operation of law. *See In re Ionosphere Clubs, Inc.*, 114 B.R. 379, 400 n.14 (S.D.N.Y.), *aff'd in part*, 922 F.2d 984 (2d Cir. 1990).)

crous to read the statute as LTV suggests: under that reading, the unions that led the fight for this statute would end up with *less* protection for their retiree members, who after all have some contract rights, than the protection afforded to non-union retirees, who had no contract rights at all.[17]

LTV has never suggested why Congress would have wanted to draw such an irrational distinction. And Congress plainly did not do so. The BPA was not addressed to the place of contract rights in bankruptcy at all—whether or not they existed pre-petition. Rather, the Benefit Act embodied a different congressional concern: Congress sought to ensure that a company that seeks the protection of a statutorily provided reorganization proceeding does not misuse that protection to deny retirees the benefits they were receiving prior to the proceeding (when employee good will still mattered) and might well receive again if the company successfully emerges from chapter 11 (when employee good will once again would matter). Reflective of *that* concern, Congress fashioned a comprehensive scheme that provides protection during and after reorganization: during chapter 11, retirees will be protected if money is available, and the debtor can seek judicial relief if no money is available; and when chapter 11 is over—and the debtor is outside the congressionally established incubator that such proceedings provide—the employer will again be able to measure its legal responsibility for such benefits in accordance with its contractual undertakings rather than a statutory mandate.

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[17] The fact that the BPA does protect against unilateral termination, as Senator Heinz observed (*see* App., *infra*, at 15a)—an observation LTV has relied on throughout this case—does not mean, of course, that the Act's protection is *limited* to unilateral terminations.

B. The Decision Below Warrants Immediate Review So That Retirees Are Not Left Stranded Without Essential Health Benefits.

The court of appeals' serious misreading of the BPA should be reviewed by this Court. The decision is already having, and unless reversed will continue to have, substantial negative effects on retirees whose companies are or will be in chapter 11 proceedings. In particular, such retirees face the immediate termination of their health benefits—precisely the chaotic and harmful result that Congress expressly sought to avoid by enacting the BPA.[18]

The Second Circuit's decision stands as a green light to all companies that, naturally, want to reduce their liabilities while in a reorganization proceeding. Until now, those companies, like LTV in this case, were likely to pay benefits until they could get a judicial determination that they are no longer required to do so. *See also In re Federated Dep't Stores, Inc.*, 132 B.R. 572 (Bankr. S.D. Ohio 1991). But now, pointing to the decision below, companies can act unilaterally. Indeed, there is every reason to expect that, if the decision in this case becomes final through denial of certiorari, LTV will terminate the benefits of its thousands of employees who receive benefits under programs terminable by LTV at will.[19]

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[18] While, in the present case, the UMWA 1974 Benefit Trust has continued paying benefits for the past 3 years and will continue doing so for a time, those payments are a substantial drain on the Trust, contributing significantly to a financial crisis that might cause suspension of benefit payments in early 1992. In other situations, retirees cut off by their employers during chapter 11 will immediately lose benefits altogether. That is especially so where no labor contract is in place—that is, for the at-will benefits placed in jeopardy by the Second Circuit.

[19] It is not clear what authority LTV thinks it would have, under the Second Circuit's reading of the BPA, to continue paying such benefits while cutting off the benefits at issue here—especially in light of LTV's view in 1986 that it was *required*, prior to the stopgap legislation, to cut off retiree benefits. *See* 134 Cong. Rec. 12,698

This is not a case where the Court should await development of an intercircuit conflict. First, many companies, like LTV, Eastern Airlines, and Johns-Manville, can and do choose to file their reorganization petitions in the Second Circuit, even if their businesses are substantially located elsewhere. The ruling in this case adds a tremendous incentive to file in the Second Circuit, thus significantly reducing the likelihood of an intercircuit conflict.

Second, even for the petitions filed outside the Second Circuit, generating such a conflict is likely to be a prohibitively burdensome and time-consuming process. Retirees would have to organize themselves, retain counsel, and pursue the complex and lengthy process of persuading another court of appeals that the ruling below was wrong. But most such retirees will not be able to afford legal counsel, especially at a time when, having lost benefits, they have just experienced a sudden increase in their health care expenses. And those retirees who do retain counsel face the arduous task of pursuing a claim through bankruptcy court, district court, and court of appeals. Moreover, at each level in these proceedings, of course, they will run into the precedent in this case—a precedent that is likely to be readily followed, certainly by the bankruptcy and district courts. *See In re Doskocil Cos. Inc.*, 130 B.R. 870 (Bankr. D. Kan. 1991) (relying on this case); *In re Federated*, *supra* (same).

Third, even if some retirees ultimately prevail in an appellate court, they will in the meantime have suffered harm that is in all likelihood irreparable. They may never

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(1988) (Sen. Metzenbaum); 132 Cong. Rec. 17,758 (1986) (Sen. Glenn). Neither type of benefits seems more, or less, "in the ordinary course of business" under 11 U.S.C. § 363(c). Neither seems more, or less, part of "operat[ing] the debtor's business" under 11 U.S.C. , 1108. Neither seems more, or less, to constitute "administrative expenses" under 11 U.S.C. § 503. *Cf.* 11 U.S.C. § 503(b)(1)(A) (authorizing payment of the "actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered *after* the commencement of the case") (emphasis added).

be able to recover the medical care that they may have been unable to get as a result of their company's actions, or the money they have had to expend to get health care that previously was covered by their retiree benefits. And the retirees of LTV and other companies not directly involved in any ultimately successful litigation will certainly be left forever in the lurch for the expenses they incur during the bankruptcy.

Those burdens are precisely what led Congress to pass the BPA to begin with, and what Congress wanted to protect retirees against in the future. As noted, the statute was enacted because of the crisis precipitated by LTV's unilateral termination of the health benefits of its 78,000 retirees. In response, Congress was besieged and had to pass several emergency provisions before it could complete the proceedings necessary to fashion an adequate remedy on a long-term basis. The courts in this case, however, immediately went about undoing Congress's solution and have now returned chapter 11 proceedings to pre-BPA circumstances (except for the limited exception of retirees covered by an extant labor agreement). This Court should restore the BPA to its intended purpose of providing orderly, court-supervised protection for all retiree benefits during the pendency of chapter 11 proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 246 August Term, 1990

(Argued September 19, 1990
Dismissed December 17, 1990

Motion For Reinstatement Filed January 23, 1991
Decided March 18, 1991)

(Appeal Reinstated April 18, 1991
Decided September 17, 1991)

Docket No. 90-5020

IN RE CHATEAUGAY CORPORATION, REOMAR, INC.,
THE LTV CORPORATION, *et al.*,
Debtors.

LTV STEEL COMPANY, INC., BCNR MINING CORPORATION,
NEMACOLIN MINES CORPORATION,
and TUSCALOOSA ENERGY CORPORATION,
Plaintiffs- Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellee,

JOSEPH P. CONNORS, SR., DONALD E. PIERCE, JR., WILLIAM MILLER, WILLIAM B. JORDAN and PAUL R. DEAN as trustees of the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST, the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,
Defendants-Appellants.

Before:

OAKES, *Chief Judge*, MESKILL, *Circuit Judge*, and RESTANI,* *Judge*.

Appeal from a judgment of the United States District Court for the Southern District of New York, Kram, *J.*, affirming a judgment of the United States Bankruptcy Court, Lifland, *C.J.* The bankruptcy court determined that the United Mine Workers of America 1974 Benefit Plan and Trust was responsible for the continued payment of certain LTV retiree health benefits.

Affirmed. Judge Restani dissents in a separate opinion.

William F. Hanrahan, Groom and Nordberg, Washington, D.C., Michael Devorkin, John J. Rieck, Jr., Doar, Devorkin & Rieck, New York City, David W. Allen, General Counsel, United Mine Workers of America Health and Retirement Funds, Washington, D.C., *for Appellants.*

Sharon Katz, Karen E. Wagner, Davis Polk & Wardwell, New York City, Kaye, Scholer, Fierman, Hays & Handler, New York City, *for Appellees.*

MESKILL, *Circuit Judge*:

This is an appeal from a judgment of the United States District Court for the Southern District of New York, Kram, *J.*, affirming a judgment of the United States Bankruptcy Court. The bankruptcy court, in orders dated August 1 and 4, 1988, concluded that the Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (1988) ("Bankruptcy Protection Act" or the "Act") (codified at various sections of 11 U.S.C. § 1101 *et seq.*), did not require LTV Steel Company (LTV Steel), BCNR Mining Corporation, Nemacolin Mines Corporation and Tuscaloosa Energy Corporation (Mining Companies) (collectively, with LTV

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* Honorable Jane A. Restani, *Judge*, United States Court of International Trade, sitting by designation.

Steel, "LTV") to continue to pay health benefits to their retirees. The bankruptcy court also concluded that the United Mine Workers of America 1974 Benefit Plan and Trust (Benefit Trust) was responsible for the continued payment of retiree health benefits.

We have jurisdiction over this matter pursuant to 28 U.S.C. § 158(d). The bankruptcy court orders were certified pursuant to Bankruptcy Rule 7054(a) and Fed. R. Civ. P. 54(b) on January 15, 1991 by Judge Burton R. Lifland, Chief Judge of the United States Bankruptcy Court for the Southern District of New York. The orders are thus final within the meaning of 28 U.S.C. § 158(d).

We conclude that the Bankruptcy Protection Act does not require LTV to continue payment of the retiree benefits herein at issue. The three mining operations have ceased doing business, the collectively bargained 1984 National Bituminous Coal Wage Agreement (1984 Wage Agreement) has expired, and the continued provision of the retiree health benefits by the Benefit Trust was expressly considered under the 1984 Wage Agreement. We therefore affirm the decision of the district court.

BACKGROUND

The relevant factual and procedural background to this action is summarized in our decision of December 17, 1990, reported at 922 F.2d 86. In that opinion we held that we lacked jurisdiction to hear this matter as it was then presented because the bankruptcy court orders were not final judgments. We remanded the action for certification of the orders pursuant to Rule 54(b). On March 18, 1991, in a decision reported at 928 F.2d 63, we denied the Benefit Trust's Motion for Reinstatement when we were presented with a statement of finality which failed to comply with the requisites of Rule 54(b).

The Benefit Trust has petitioned for reinstatement once again. The order of the bankruptcy court now comports

with Rule 54(b) and we are satisfied that these orders are final and our jurisdiction is properly invoked. We, therefore, confront the issue originally presented to us on September 19, 1990. We address whether the Bankruptcy Protection Act requires LTV to continue the provision of health benefits to retirees of the Mining Companies after they ceased operations and the Wage Agreement providing for the payment of those benefits expired.

DISCUSSION

The Bankruptcy Protection Act amended section 608 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1987, to read in pertinent part as follows:

> (a)(1) Subject to paragraphs (2), (3), (4), and (5), and notwithstanding title 11 of the United States Code, the trustee shall pay benefits to retired former employees under a plan, fund, or program maintained or established by the debtor prior to filing a petition (through the purchase of insurance or otherwise) for the purpose of providing medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death.
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> * * * *
>
> (3) The trustee shall pay benefits in accordance with this subsection until—
>
> (A) The dismissal of the case involved; or
>
> (B) the effective date of a plan confirmed under section 1129 of such title which provides for the continued payment after confirmation of the plan of all such benefits at the level established under paragraph (2) of this subsection, at any time prior to the confirmation of the plan, for the duration of the period the debtor (as defined in such title) has obligated itself to provide such benefits.
>
> * * * *

> (c) This section is effective with respect to cases commenced under chapter 11, of title 11, United States Code, in which a plan for reorganization has not been confirmed by the court and in which any such benefit is still being paid on October 2, 1986, and in cases that become subject to chapter 11, title 11, United States Code, after October 2, 1986 and before the date of the enactment of the Retiree Benefits Bankruptcy Protection Act of 1988.

Pub. L. No. 99-591, tit. VI, 100 Stat. 3341-74 as amended by Bankruptcy Protection Act, Pub. L. No. 100-334, § 3(a), 102 Stat. 613 (codified at 11 U.S.C. § 1106-note). LTV filed for bankruptcy under Chapter 11 and has not obtained dismissal of the case or approval of any plan of reorganization under section 1129. LTV was still paying benefits on October 2, 1986, the date that triggered the application of the Act. Based on these facts, the Benefit Trust asserts that LTV must continue paying the retiree benefits until a plan of reorganization is approved. We disagree.

The Act expressly states that the trustee in bankruptcy, here LTV, the debtor-in-possession, must continue to "pay benefits to retired former employees under a plan, fund, or program maintained or established by the debtor prior to filing a petition [for bankruptcy]." Thus, we must analyze the "plan, fund, or program maintained or established" by LTV before it filed for bankruptcy in order to determine the trustee's obligation to LTV's retired former employees.

The 1984 Wage Agreement provided for the payment of retiree benefits. Article XX of that document is the precise section that governed the continued provision of benefits. Section (a) of Article XX discusses the general purposes of Article XX. Section (b) discusses the 1950 Plans and Trusts, the 1974 Plans and Trusts were covered in section (c), and section (d) of Article XX discusses the term and amounts of employer contributions. Section (a) states, in pertinent part:

> This Article makes provision for pension, health and other benefits for Employees covered by this Agreement, ... The benefits to be provided are as set forth under separate plans and trusts referred to in Sections (b) and (c) of this Article.
>
> * * * *
>
> The general purpose of the plans referred to in this Article shall be to provide health care for working and retired miners and their dependents; pensions for miners upon their retirement; health care and financial support for eligible disabled miners; and financial support for surviving spouses and surviving dependents provided by each of the Trusts and Plans referred to in this Article.
>
> Except as otherwise specifically set forth in this Article, it is agreed that the Trusts referred to in this Article are irrevocable Trusts created pursuant to and within the scope of Section 302(c) of the Labor Management Relations Act, 1947, and shall endure as long as the purposes for their creation shall exist.

The Health and Retirement Benefits provision of the Wage Agreement continues to describe, in detail, the 1974 Benefit Trust. It states: "The 1974 Benefit Trust provides certain health and other benefits, not including pension benefits, and the terms and conditions under which those benefits will be provided are as set forth in the plan under the 1974 Benefit Trust and under the terms of this Article."

In subsection (3) (ii) of section (c), the plan states:

> The 1974 Benefit Plan and Trust provides health and other non-pension benefits during the term of this Agreement, to any retired miner under the 1974 Benefit Pension Plan or any successor plan(s) thereto who would otherwise cease to receive the health and other non-pension benefits provided herein

> because the signatory Employer (including successors and assigns) for whom such miner last worked in signatory classified employment is no longer in business . . . . For purposes of determining eligibility under the 1974 Benefit Plan and Trust, an Employer is considered to be "no longer in business" only if the Employer
>
> (a) has ceased all mining operations and has ceased employing persons under this Wage Agreement, with no reasonable expectation that such operations will start up again; and
>
> (b) is financially unable (through either the business entity that has ceased operations as described in subparagraph (a) above, including such company's successors or assigns, if any, or any other related division, subsidiary, or parent corporation, regardless of whether covered by this Wage Agreement or not) to provide health and other non-pension benefits to its retired miners and surviving spouses.

In sum, the Mining Companies were obligated to pay retiree benefits under the terms of the Wage Agreement. The Benefit Trust was to pay benefits if the Mining Companies were no longer in business. No provision in the agreement discusses coverage upon the expiration of the Wage Agreement without adoption of a subsequent agreement. The Benefits Trust contends that because LTV, as parent to the signatory Mining Companies, is not "out of business" under the narrow definition set forth in the 1984 Wage Agreement, LTV must continue to pay the retiree benefits during LTV's reorganization.

There are several factors militating against this interpretation. Section 10 of the General Description of the Health and Retirement Benefits, under the heading "Health Care," in Article XX, states "[h]ealth care benefits are guaranteed *during the term of this Agreement* subject to the terms of this Agreement at the level of

benefits provided in the 1950 Benefit Plan, the 1974 Benefit Plan, and the Employer Benefit Plan." (emphasis added). This portion of the Wage Agreement suggests that the parties are bound by the provisions of the Wage Agreement only as long as the Wage Agreement itself is effective.

The expiration date of the 1984 Wage Agreement was clearly set forth in Article XXIX. It states in pertinent part:

> Except as provided in Article XXVIII, section (b) (Severability Clause), this Agreement shall not be subject to termination by either party signatory hereto prior to 11:59 p.m., January 31, 1988 provided, however, that either the parties of the first part or the party of the second part may terminate this Agreement on or after 11:59 p.m., January 31, 1988 by giving at least sixty days written notice to the other party of such desired termination date.

The language of the above quoted provisions indicates that once LTV terminated the Wage Agreement upon its expiration in 1988, health benefits were no longer guaranteed under the Wage Agreement. There is no intimation that the parties intended LTV's obligation to continue beyond the life of the Wage Agreement. LTV notified the employees of the Mining Companies that it would cease operations without continuance in 1986. LTV notified the Benefit Trust in November and again in December of 1988 that the 1984 Wage Agreement would terminate after January 31, 1988. The 1984 Wage Agreement ceased to be effective after that date. Thus the parties were no longer bound by it as of that date. If LTV is not bound by the terms of the Wage Agreement, LTV has no obligation to pay the retiree health benefits. The Benefit Trust points to no other agreement or provision within the 1984 Wage Agreement that would suggest a contrary result.

Based on the analysis set forth above, the "plan, fund, or program maintained or established" by the Mining Companies at the time LTV sought protection from creditors under Chapter 11 can be described simply. The Mining Companies guaranteed payment of retiree benefits during the term of the Wage Agreement. The Wage Agreement expired immediately after January 31, 1988. Regardless of the obligations of any other parties, neither the Mining Companies nor LTV Steel were obliged to pay retiree benefits after the termination of the Wage Agreement. The 1984 Wage Agreement was the plan in effect at the time LTV sought protection under Chapter 11. The Bankruptcy Protection Act requires that during reorganization the parties continue to provide benefits according to the plan in effect at the time of the declaration of bankruptcy; the Bankruptcy Protection Act does not alter the terms of that plan. As noted, the plan does not require LTV to pay for benefits after the 1984 Wage Agreement expired. LTV Steel and the Mining Companies, therefore, are not obligated by the Wage Agreement or by statute to continue to pay for retiree benefits. The Benefit Trust has conceded that if it is determined that LTV is not required to pay the retiree health benefits the Benefit Trust is so required.

Our interpretation of the Wage Agreement is consistent with the reasoning of other courts that have confronted the issue of responsibility for retiree benefits under the Wage Agreement. The *Royal Coal* cases denote this.

In *District 29, United Mine Workers of America* v. *Royal Coal Company (Royal Coal I)*, 768 F.2d 588 (4th Cir. 1985), it was determined that the coal company's responsibility to provide health benefits to retired employees under a negotiated Wage Agreement terminated with the expiration of that Wage Agreement. Although this decision was based on the National Bituminous Coal Wage Agreements of 1978 and 1981, those agreements are substantially similar to the 1984 Wage Agreement

at issue herein. In *Royal Coal I*, as in the instant case, the company ceased mining operations during the term of the wage agreement in effect at the time. The company did not enter into a subsequent wage agreement to provide health benefits to retired employees. *Id.* at 589. The retired employees sued the coal company and the 1974 Benefit Trust to force one of the two defendants to continue to provide the health benefits.

In deciding *Royal Coal I*, the Fourth Circuit looked to the intent of the parties when they entered into the contract to determine whether they intended the employer's obligations to continue beyond the expiration of the collective bargaining agreement. *Id.* at 590. The Court, after carefully examining the language of the Wage Agreements and relevant case law, held that "[the company's] obligation to provide health benefits . . . to its retired . . . coal miners under the 1978 and 1981 Wage Agreements does not extend beyond the expiration of those Agreements." *Id.* at 592; *see also District 17, Dist. 29, Local 7113, and Local Union 6023, United Mine Workers of America* v. *Allied Corp.*, 765 F.2d 412 (4th Cir.), *cert. denied*, 473 U.S. 905 (1985).

In 1987, building on *Royal Coal I*, the Fourth Circuit again confronted the issue of the continued provision of retiree health benefits. In *District 29, United Mine Workers of America* v. *United Mine Workers of America 1974 Benefit Plan & Trust (Royal Coal II)*, 826 F.2d 280 (4th Cir. 1987, *cert. denied*, 485 U.S. 935 (1988), the court held that the 1974 Benefit Trust was required to provide retiree health benefits when the employer was still "in business" as defined in the Wage Agreement, but was no longer legally obligated to pay the benefits. *Id.* at 283. Again the court looked to the intent of the parties and concluded that "the intentions of the parties in providing for retirement health benefits was to guarantee their provision for life." *Id.* at 282. After acknowledging that the former employer was no longer legally responsible for the

provision of retiree health benefits, the court held that "[t]o construe the contract to create no liability on the part of the 1974 Benefit Plan would have the effect of defeating the expressed intention to provide lifetime benefits." *Id.* at 283. The court thereafter found the 1974 Benefit Trust responsible for the continued provision of health benefits.

As noted above, the 1984 Wage Agreement is substantially similar to the 1978 and 1981 Wage Agreements with respect to the plan for the provision of retiree health benefits. The plans established under these Wage Agreements have been interpreted consistently by the courts, and it uniformly has been held that an employer is not legally responsible for the provision of retiree health benefits after the expiration of a wage agreement. *See Royal Coal II*, 826 F.2d 280; *Royal Coal I*, 768 F.2d 588; *United Mine Workers of America Int'l Union by Rabbit* v. *Nobel*, 720 F.Supp. 1169 (W.D. Pa. 1989), *aff'd*, *Appeal of Bituminous Coal Operators' Ass'n*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied sub nom. Bituminous Coal Operators' Ass'n* v. *United Mine Workers of America Int'l Union by Rabbit*, 111 S.Ct. 1102 (1991); *Schifano* v. *United Mine Workers of America 1974 Benefit Plan & Trust*, 655 F.Supp. 200 (N.D. W.Va. 1987). These same courts have held that the Benefit Trust is liable for the continued provision of retiree benefits. Thus, even before the enactment of the Bankruptcy Protection Act courts interpreted the plan for the provision of retiree health benefits to obligate the employer only as long as the Wage Agreement was in effect; the Benefit Trust was required to provide the benefits thereafter. This is consonant with the conclusion we reach today.

The legislative history of the Bankruptcy Protection Act does not suggest an interpretation other than the one we have reached. The Bankruptcy Protection Act clearly was designed to "provide specific protections under the Bankruptcy Code for certain insurance benefits of

retired employees." S. Rep. No. 119, 100th Cong., 2nd Sess. 3, *reprinted in* 1988 U.S. Code Cong. & Admin. News 683, 685. As numerous legislators noted, the Act was created to "insure that promises made to employees during their working years are not broken during their retirement years." 133 Cong. Rec. H1257 (daily ed. Mar. 11, 1987) (remarks by Representative Frost). Central to the discussion was the belief that companies in bankruptcy could not legally cease to provide benefits demanded under the collectively bargained contracts in effect. *See, e.g.*, 133 Cong. Rec. H1262 (daily ed. Mar. 11, 1987) (remarks by Representative Eckart) ("Bankruptcy court has become an increasingly popular vehicle allowing companies to renege on their contractual obligations to their retired workers."); *id.* (remarks by Representative Regula) ("Companies must be put on notice that they cannot unilaterally ignore their legal obligations to their former employees."); 132 Cong. Rec. H5259 (daily ed. July 31, 1986) (remarks by Representative Nowak) ("I do not believe that the bankruptcy laws were intended to shield companies and allow them to breach their legal duties to individuals in this manner.").

Here the retired employees are guaranteed provision of health benefits for life under the collective bargaining agreement. That agreement nas been interpreted to mean that if the Wage Agreement terminates the benefits are still provided, but they are provided by the Benefit Trust, instead of by the companies. The Mining Companies ceased operations in 1986. The 1984 Wage Agreement expired in 1988. Upon its expiration, the burden for the provision of retiree health benefits shifted to the Benefit Trust. There is no cessation of benefits, there is no termination of benefits. Whether the plan is able to fund fully the benefits is a separate issue. The retired employees are receiving exactly what they bargained for in the 1984 Wage Agreement.

CONCLUSION

In sum, the Bankruptcy Protection Act requires that companies in Chapter 11 bankruptcy continue to provide benefits to retired employees in conformity with the plan or fund in existence at the time bankruptcy was declared. The 1984 Wage Agreement was the plan in effect when LTV sought protection under Chapter 11, thus the terms of the 1984 Wage Agreement govern the provision of retiree benefits. According to the terms of the Wage Agreement, the Mining Companies were responsible for the provision of the benefits during the term of the Wage Agreement. When that Agreement expired, however, that obligation shifted to the Benefit Trust. The Benefit Trust is now responsible for the continued provision of the retiree health benefits. This conclusion is consistent with our reading of the Bankruptcy Protection Act, the legislative history to that Act, and the relevant case law.

RESTANI, JUDGE: I dissent.

I.

According to the plain language of section 3 of the Retiree Benefits Bankruptcy Protection Act of 1988 ("Bankruptcy Protection Act" or "the Act"), "the trustee shall pay [health] benefits to retired former employees under a plan, fund, or program maintained or established by the debtor prior to filing a petition, . . . until . . . the dismissal of the case involved; or . . . the effective date of a plan confirmed under section 1129 . . . ." [1] The Act also provides that the level of benefits may be modified if there is an agreement on modification, or the bankruptcy court finds modification is necessary to reorganization and "the balance of equities clearly favors the modification." Bankruptcy Protection Act § 3(a)(2)(A); § 3(a)(2)(B); 11 U.S.C. § 1113(b)(1)(A). LTV et al., debtors in possession, have all the rights and duties of a "trustee," with certain exceptions not relevant to this appeal. 11 U.S.C. §§ 1107(a), 1114(e)(1).

The district court decided, in essence, that although the Act applies to health benefits that are terminable at will, it does not apply to health benefits that are provided pursuant to a contract obligation which is interpreted to have expired. I would reverse this decision as I do not find any intent on the part of Congress to distinguish between a contract right which never existed and one which has terminated.[2]

In reaching its conclusion that LTV is not responsible for the continued payment of LTV retiree health benefits,

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[1] The Bankruptcy Protection Act is codified in the note following 11 U.S.C. § 1106. It was enacted in Public Law Number 99-591 on October 30, 1986 and amended by Public Law Numbers 100-41 (May 15, 1987), 100-99 (August 18, 1987) and 100-334 (June 16, 1988).

[2] *See infra* note 3 and and accompanying text (regarding interpretation of the Wage Agreement at issue).

the district court did not quote the statute. Rather, the court relied on two pieces of legislative history which do not address whether a debtor in possession continues to be liable for benefits after the expiration of a bargained for collective agreement. The first is a comment of Senator Byrd to the effect that companies in Chapter 11 "have a legal and contractual obligation to their retirees . . . This legislation will not guarantee continuation of these benefits, but it will provide a mechanism that will allow the retirees' position to be heard . . ." 133 Cong. Rec. 3,732 (1987). The second comment was that of Senator Heinz that "[t]he bill will protect retirees from unilateral termination of benefits by a company filing a Chapter 11 bankruptcy petition." 134 Cong. Rec. 12,700 (1988). The district court then concluded that "[t]he legislative history reveals that the Retiree Benefits Bankruptcy Protection Act of 1988 does not require LTV to continue to pay retiree benefits in this case." Joint Appendix at 655. It is apparent from their lack of reliance on the statute that both the district court and LTV believe the bare words of the statute call for LTV to continue paying benefits. The majority takes a different approach, which at the outset focuses on statutory language, but it applies the statutory language in a circular manner, thereby defeating the purpose of the statute.

Furthermore, both the district court and the majority find that, despite the Act, the Benefit Trust, rather than LTV, must pay retiree benefits under the terms of the Wage Agreement. They base this conclusion primarily on the *Royal Coal* cases.[3] In the *Royal Coal* cases the Fourth Circuit held that a solvent mining company which had sold all of its mining operations without transferring

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[3] *District 29, United Mine Workers of America v. Royal Coal Co. (Royal Coal I)*, 768 F.2d 588 (4th Cir. 1985) and *District 29, United Mine Workers of America v. United Mine Workers of America 1974 Benefit Plan & Trust (Royal Coal II)*, 826 F.2d 280 (4th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988).

to the purchasers its obligations to pay retiree health benefits, and which did not sign the 1981 Wage Agreement, was not liable for such benefits after the expiration of the 1981 Wage Agreement. *See Royal Coal I*, 768 F.2d at 592. The Benefit Trust, which is funded by Wage Agreement signatory employers, was held liable for the health benefits on the basis that the Wage Agreement intended funding of lifetime benefits. The court reached this conclusion despite contract wording which indicated not only that the Benefits Trust's obligation applies "during the terms of this agreement" but also that the obligation depends on both cessation of operations and inability to pay on the part of the employer and its successor. *Royal Coal II*, 826 F.2d at 282-83.

The *Royal Coal* cases, however, deal with the interpretation of the Wage Agreement and not interpretation of the Retiree Protection Act, which was enacted after the *Royal Coal* cases were decided. Furthermore, the Act specifically addresses the event of bankruptcy. The Act provides that the "trustee" (a successor to the employer) must pay. Under *Royal Coal* the Benefit Trust's obligation arises because the obligation of the *employer* (and its successor) ceases. If one accepts the reasoning of the *Royal Coal* cases, the statute cannot be satisfied by payment from the Benefit Trust. That is, payment by the Benefit Trust cannot be payment by the *trustee*.

The legislative history cited by the district court and, more extensively, by the majority, is consistent with the plain language of the Act. The district court and majority, however, have seized upon the concept of the "unilateral" nature of certain terminations of benefits, a concept found in the Heinz statement quoted *supra* at 2-3. This reliance is misplaced. Under the facts at hand, LTV's decision not to continue its 1984 Wage Agreement obligations to the retirees was no less unilateral than the decision to terminate "at will" benefits, and certainly LTV's original attempt to reject the Wage Agreement

pursuant to the trustee's ordinary bankruptcy powers was a unilateral action. But even more persuasive is the absence of the limiting word "unilateral" from the statutory language. Of course the Act does protect workers against unilateral termination of benefits, but the plain language of the statute does not limit it to this purpose only. As explained by the sponsors of the legislation, the Act applies whether or not a collective bargaining agreement is in effect. "*The provisions of section 3 apply to union and nonunion retirees . . . . The benefits subject to these standard are not required to arise from a collective bargaining agreement.*" 134 Cong. Rec. 12,698 (1988) (statement of Sen. Metzenbaum) (emphasis added). "This legislation protects retired employees who are covered by a collective bargaining agreement, *as well as those where no collective bargaining agreement is in effect.*" 133 Cong. Rec. 21,099 (1987) (statement of Sen. Heflin) (emphasis added).

The most telling passage of legislative history is the following:

> [The bill] . . . requires a company to continue paying for these [retiree health] benefits even after the termination of a collective bargaining agreement. Only if a company can prove a modification is absolutely necessary and that it treats everyone fairly can a court, after a hearing, order any modification.

Retiree Benefits Security Act of 1987: Hearings on S. 548 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 14 (1987) (statement of Sen. Metzenbaum). This passage, unlike those cited by the district court, is directly on point. Appellees argue that Senator Metzenbaum was referring to hypothetical agreements which require continuation of retiree health benefits after the agreement terminates. Senator Metzenbaum's statement, however, is replete with references to LTV and its contracts. His statement was without limitation with

regard to the terms of any contract. Therefore, I cannot agree with the majority that "[t]he legislative history of the Bankruptcy Protection Act does not suggest an interpretation other than the one we have reached." Slip op. at 13-14.

Accordingly, the Act continues *all* retiree health benefits which are in effect immediately prior to bankruptcy. The Act also states that termination or modification of benefits is not permitted prior to reorganization *unless either the trustee and an authorized representative of the affected parties agree to the modification, or if the trustee convinces the court that such modification is necessary and equitable.* The clear purpose of the Act is to give the bankruptcy court power to resolve the competing interests of retirees, debtors and creditors, if agreement as to continuation and level of benefits cannot be reached. The health benefits of retirees are not to be terminated by any action until the bankruptcy court has time to act. The passages of legislative history cited by the majority do not reveal an intent other than that reflected in the plain language of the statute; that is, despite contractual rights or lack thereof, benefits are to continue on an interim basis until the parties agree or until the bankruptcy court makes the determinations specified in the Act. If Congress intended some distinction between former employees *without contracts and those whose contractual rights had expired,* it simply did not say so. If it had any distinction among employees in mind, it was a distinction between employees of companies which seek protection under the bankruptcy laws and employees of companies who do not. I believe that the majority errs in reading into the statute special exemptions applicable to bargained for benefits, not enunciated by Congress.

II.

I believe the majority also erred in relying in any way on the presence of the Benefit Trust with regard to interpretation of the statute. The Benefit Trust is intended

as a last resort for the funding of retiree health benefits. *Royal Coal II* finds the Benefit Trust liable, despite contract language to the contrary, because of the overall purpose of the contract, that is, retirees must be provided for. Here, the Act spells out how provision for retirees is to be made. Moreover, although successor Wage Agreements require funding of the Benefit Trust to meet retiree health benefit requirements, it has not been established that current and future signatories will be able to bear the burden of former signatories throughout the lifetime of the retirees. This factual issue is not resolved. In any case, given the plain language of the statute, I would find the status of the Benefit Trust irrelevant as to statutory construction.

I do not reach the issue of the contractual liability of the Benefit Trust. If LTV remains obligated to pay benefits under the statutory criteria, the obligation of the Benefit Trust does not arise.[4] The bankruptcy court has not made the findings which could resolve this issue.

CONCLUSION

I would find LTV liable for payment of benefits unless the bankruptcy court makes the findings required for modification of benefits, as set forth in Section 3(a)(2) of the Retiree Protection Act.

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[4] It is interesting to note that even if one accepts the holdings of the *Royal Coal* cases, for companies in bankruptcy the statute restores in large measure the original language of the Wage Agreement, which premises the liability of the Benefit Trust on the *inability* of the employer to pay.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 246—August Term, 1990

(Argued September 19, 1990
Dismissed December 17, 1990

Motion For Reinstatement Filed January 23, 1991
Decided March 18, 1991)

Docket No. 90-5020

IN RE CHATEAUGAY CORPORATION, REOMAR, INC., THE LTV CORPORATION, *et al.*,
Debtors.

LTV STEEL COMPANY, INC., BCNR MINING CORPORATION, NEMACOLIN MINES CORPORATION, and TUSCALOOSA ENERGY CORPORATION,
Plaintiffs- Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellee,

JOSEPH P. CONNORS, SR., DONALD E. PIERCE, JR., WILLIAM MILLER, WILLIAM B. JORDAN and PAUL R. DEAN as trustees of the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,
Defendants-Appellants.

Before:

OAKES, *Chief Judge*, MESKILL, *Circuit Judge*,
and RESTANI,* *Judge*.

Request to reinstate appeal previously dismissed by this Court for lack of jurisdiction. *In re Chateaugay Corp.*, 922 F.2d 86 (2d Cir. 1990). In response to that dismissal, appellant United Mine Workers of America 1974 Benefit Plan and Trust secured a judgment from the United States Bankruptcy Court for the Southern District of New York, Lifland, *J.*, and now seeks to reinstate the appeal.

Reinstatement denied.

WILLIAM F. HANRAHAN, Groom and Nordberg, Washington, D.C., Michael Devorkin, John J. Rieck, Jr., Doar, Devorkin & Rieck, New York City, David W. Allen, General Counsel, United Mine Workers of America, Washington, D.C., *for Appellants*.

SHARON KATZ, KAREN E. WAGNER, Davis Polk & Wardwell, New York City, Kaye, Scholer, Fierman, Hays & Handler, New York City, *for Appellees*.

Per Curiam:

This is a request to reinstate an appeal previously dismissed by this Court for lack of jurisdiction. *In re Chateaugay Corp.*, 922 F.2d 86 (2d Cir. 1990). Appellant United Mine Workers of America 1974 Benefit Plan and Trust (Benefit Trust) secured a judgment from the United States Bankruptcy Court for the Southern Dis-

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* Honorable Jane A. Restani, *Judge*, United States Court of International Trade, sitting by designation.

trict of New York, Lifland, *J.*, in response to our opinion and now seeks to reinstate the appeal.

For the reasons that follow, we decline to reinstate the appeal. This denial is without prejudice to reinstatement when our jurisdiction has been invoked properly.

As noted above, we dismissed this appeal for lack of jurisdiction. In so doing we expressly provided the Benefit Trust with an opportunity to reinstate the appeal. We made it clear that in order for us to have jurisdiction the Benefit Trust had to obtain certification from the bankruptcy court pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, incorporated in its entirety into the Bankruptcy Rules through B.R. 7054(a). The judgment obtained by the Benefit Trust does not satisfy the requirements of Rule 54(b).

The language of Rule 54(b) unambiguously states that absent an express determination of no just reason for delay and an express direction for entry of judgment, the order at issue is not final. Courts, if anything, have interpreted Rule 54(b) even more strictly than the Rule's language requires.

Case law dictates that "a district court cannot merely announce that 'there is no just reason for delay.'" *Pension Benefit Guaranty Corp.* v. *LTV Corp. (PBGC)*, 875 F.2d 1008, 1014 (2d Cir. 1989) (quoting Fed. R. Civ. P. 54(b)). "'Rather, its certification must be accompanied by a reasoned, even if brief, explanation of its conclusion.'" *Id.* (quoting *National Bank of Washington* v. *Dolgov*, 853 F.2d 57, 58 (2d Cir. 1988) (per curiam) (citation omitted)), *rev'd on other grounds*, 110 S.Ct. 2668 (1990); *see Curtiss-Wright Corp.* v. *General Elec. Co.*, 446 U.S. 1, 8 (1980). If the 54(b) certificate is defective because it is missing either element of Rule 54(b), we are deprived of jurisdiction. *See* Fed. R. Civ. P. 54(b).

In this instance, although the bankruptcy court entered judgment, the certificate does not include a finding of no

just reason for delay. As a result, the elements of Rule 54(b) are not satisfied and we still lack jurisdiction to hear the appeal. Clearly the appeal cannot now be reinstated.

It may not have been clear to the Benefit Trust and the bankruptcy court that strict compliance with Rule 54(b) is required in the bankruptcy context. As a result, we are providing the Benefit Trust with yet another opportunity to cure the jurisdictional defect that now exists. The Benefit Trust is granted thirty (30) days to obtain the 54(b) certification. On procuring a proper 54(b) certificate, containing a statement of no just reason for delay with a brief explanation of the reasoning behind that finding, and an express direction for entry of judgment, the Benefit Trust may again seek to reinstate the appeal. Upon reinstatement we will decide the merits of this action without further briefing or argument.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 246—August Term, 1990

(Argued September 19, 1990
Decided December 17, 1990)

Docket No. 90-5020

IN RE CHATEAUGAY CORPORATION, REOMAR, INC., THE LTV CORPORATION, *et al.*,

Debtors.

LTV STEEL COMPANY, INC., BCNR MINING CORPORATION, NEMACOLIN MINES CORPORATION, and TUSCALOOSA ENERGY CORPORATION,

Plaintiffs- Appellees,

—v.—

UNITED MINE WORKERS OF AMERICA,

Defendant-Appellee,

JOSEPH P. CONNORS, SR., DONALD E. PIERCE, JR., WILLIAM MILLER, WILLIAM B. JORDAN and PAUL R. DEAN as trustees of the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,

Defendants-Appellants.

Before:

OAKES, *Chief Judge*, MESKILL, *Circuit Judge*, and RESTANI,* *Judge*.

Appeal from an order of the United States District Court for the Southern District of New York, Kram, *J.*, affirming two orders of the United States Bankruptcy Court for the Southern District of New York, Lifland, *C.J.*, which held that the Retiree Benefits Bankruptcy Protection Act of 1988 does not require LTV to pay retiree health benefits throughout its reorganization and that the United Mine Workers of America 1974 Benefit Plan and Trust is liable for continued payment of retiree benefits.

Dismissed for lack of appellate jurisdiction without prejudice to reinstatement.

WILLIAM F. HANRAHAN, Groom and Nordberg, Washington, D.C. (Michael Devorkin, John J. Rieck, Jr., Doar, Devorkin & Rieck, New York City, David W. Allen, General Counsel, United Mine Workers of America, Washington, D.C., of counsel), *for Appellants*.

SHARON KATZ, Davis Polk & Wardwell, New York City (Karen E. Wagner, Davis Polk & Wardwell, New York City, Kaye, Scholer, Fierman, Hays & Handler, New York City, of counsel), *for Appellees*.

MESKILL, *Circuit Judge:*

This is an appeal from an order of the United States District Court for the Southern District of New York,

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* Honorable Jane A. Restani, *Judge*, United States Court of International Trade, sitting by designation.

Kram, *J.*, affirming orders of the bankruptcy court granting partial summary judgment in favor of plaintiffs-appellees LTV Corporation and its mining subsidiaries (LTV). The United States Bankruptcy Court for the Southern District of New York, Lifland, *C.J.*, previously held that LTV is not liable for the continued payment of retiree benefits after the expiration of the collective bargaining agreement. That court also determined that the United Mine Workers of America 1974 Benefit Plan and Trust (Benefit Trust) is responsible for the provision of retiree benefits under the terms of the National Bituminous Coal Wage Agreement of 1984 (Wage Agreement). The questions presented on appeal are whether the Retiree Benefits Bankruptcy Protection Act, 11 U.S.C. § 1114, applies to LTV and what party, LTV or the Benefit Trust, is required to provide benefits to LTV's retirees.

We dismiss for lack of jurisdiction. Appellants have thirty days in which to obtain certification of the judgment of the bankruptcy court in accordance with Bankruptcy Rule 7054(a). Upon proper certification and notification to this Court, this appeal will be reinstated and returned to this panel for consideration of the merits without further argument or briefs.

BACKGROUND

Facts

In July 1986, LTV Steel Company and many of its subsidiaries, including BCNR Mining Corporation, Nemacolin Mines Corporation, and Tuscaloosa Energy Corporation (collectively "LTV"), sought protection under Chapter 11 of the Bankruptcy Code. 11 U.S.C. § 1101 *et seq.* In that same year the three mining subsidiaries closed their doors with no intention of reopening. Since that time, LTV has been operating as debtor-in-possession under the Bankruptcy Code.

LTV's mine employees were paid pursuant to the collectively bargained National Bituminous Coal Wage

Agreement included terms providing for retiree benefits. These terms included provisions for funding the Benefit Trust. Established by the 1974 Wage Agreement, the Benefit Trust provides health and life insurance benefits to employees retiring after January 1, 1976. Successive Wage Agreements in 1978, 1981 and 1984 perpetuated the Benefit Trust which was funded by employer contributions as specified in the Wage Agreement. The Wage Agreement required LTV to continue paying retiree benefits and contributing to the Benefit Trust for either the term of the Wage Agreement or until LTV was no longer in business.

Immediately after declaring bankruptcy, LTV ceased benefit payments to all retirees, claiming such payments were not permitted under the terms of the Bankruptcy Code. LTV subsequently petitioned the bankruptcy court for an order permitting payment of the benefits retroactive to July 1986. That order was granted and LTV recommenced payment of retiree benefits.

The Wage Agreement was scheduled to expire on January 31, 1988. In November and again in December 1987, LTV informed the Benefit Trust of the impending expiration of the Wage Agreement, that LTV would cease payment of retiree benefits on the date of expiration and that the Benefit Trust was responsible for paying the retiree benefits on February 1, 1988. The Benefit Trust responded that it would not pay benefits to LTV retirees. Despite the expiration of the Wage Agreement, LTV continued to pay the retiree benefits.

Legislative Environment

In 1986, Congress was spurred into action by the cessation of benefits for approximately 79,000 LTV retirees when LTV filed for bankruptcy. Congress enacted temporary legislation requiring restoration of the benefits, and giving retiree benefit payments the status of administrative expenses, thereby permitting the payments dur-

ing the reorganization. This temporary legislation was renewed and extended several times, but ultimately expired on October 15, 1987. On June 16, 1988 Congress passed the Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (1988) (codified in part at 11 U.S.C. §§ 1114, 1129 (1990)) ("Bankruptcy Protection Act" or the "Act"). The Bankruptcy Protection Act, applicable to bankruptcy cases commenced on or after June 16, 1988, requires a trustee in bankruptcy to continue paying retiree benefits throughout reorganization under the plan and at the level maintained prior to the filing for bankruptcy. Section 3 of the Act revives the stopgap legislation that expired on October 15, 1987 and states, in pertinent part:

> (a)(1) Subject to paragraphs (2), (3), (4) and (5), and notwithstanding title 11 of the United States Code [this title]the trustee shall pay benefits to retired former employees under a plan, fund, or program maintained or established by the debtor prior to filing a petition (through the purchase of insurance or otherwise) for the purpose of providing medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death.
>
> ....
>
> (c) This section is effective with respect to cases commenced under chapter 11, of title 11, United States Code [this chapter], in which a plan for reorganization has not been confirmed by the court and in which any such benefit is still being paid on October 2, 1986, and in cases that become subject to chapter 11, title 11, United States Code, after October 2, 1986 and before the date of the enactment of the Retiree Benefits Protection Act of 1988 [June 16, 1988].

Retiree Benefits Bankruptcy Protection Act of 1988, § 3, Pub. L. 100-334, 102 Stat. 610, 613 (1988). Pursuant to section 3, the trustee in bankruptcy must continue to pay

the retiree benefits throughout the reorganization unless the plan is modified through one of the methods specified in the statute.

Procedural History

This adversary proceeding was filed in the United States Bankruptcy Court for the Southern District of New York on June 23, 1988. LTV sought a declaratory judgment that (1) LTV is not responsible for payment of the retiree benefits after the expiration of the collectively bargained Wage Agreement and the Benefit Trust is obligatd to pay those retiree benefits, and (2) that the Benefit Trust is liable to LTV for benefits paid by LTV after the expiration of the Wage Agreement.

The United States Bankruptcy Court for the Southern District of New York, Lifland, *C.J.*, entered partial summary judgment for LTV in two orders dated August 1 and August 4, 1988. The Benefit Trust filed a motion for leave to appeal. On September 13, 1988, the United States District Court for the Southern District of New York, Knapp, *J.*, heard arguments on the finality of the bankruptcy court orders. Judge Knapp determined that if the parties stipulated to and obtained a dismissal of pending counterclaims, the orders would be final and appealable. An order adjudging the bankruptcy court orders to be final was entered on October 17, 1988.

The appeal subsequently was assigned to Judge Kram, and the merits of the appeal were heard. After oral argument, Judge Kram held that the Retiree Benefits Bankruptcy Protection Act did not require LTV to continue paying retiree benefits after the expiration of the Wage Agreement and found the Benefit Trust liable for payment of the benefits. An order affirming the orders of the bankruptcy court was entered on March 9, 1990. *In re Chateaugay*, 111 B.R. 399 (Bkrtcy. S.D.N.Y. 1990). This appeal followed.

Appellant Benefit Trust contends that the district court erred when it found that the Bankruptcy Protection Act did not require LTV to continue paying retiree benefits and seeks a judgment making LTV responsible for funding the benefits for its retirees. LTV asserts that we lack jurisdiction to hear this appeal because the bankruptcy court's orders were interlocutory.

DISCUSSION

The United States District Court for the Southern District of New York, Knapp, *J.*, on October 17, 1988, entered an order finding the bankruptcy court orders of August 1 and August 4, 1988 final for purposes of appeal within the meaning of 28 U.S.C. § 158. The orders lacked the certification of finality from the bankruptcy court required pursuant to Bankruptcy Rule 7054, which incorporates Rule 54(b) of the Federal Rules of Civil Procedure. Thus, as will be made clear, the bankruptcy court orders are interlocutory, contrary to the findings of the district court.

We are obligated to determine the jurisdictional basis of every matter before this Court. Pursuant to 28 U.S.C. § 158(d), the relevant appellate jurisdictional statute in bankruptcy proceedings, the courts of appeals have jurisdiction "of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section." 28 U.S.C. § 158(d) (1988). In contrast, the district courts have jurisdiction to hear appeals from "final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges." 28 U.S.C. § 158(a) (1988).[1] Thus, the district courts have jurisdiction to hear appeals from interlocutory orders in instances where the courts of appeals do not.

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[1] 28 U.S.C. § 158(b) permits the establishment of a bankruptcy appellate panel and strictly limits the jurisdiction of that panel. Section 158(b) is not relevant to this appeal.

A district court order reviewing a bankruptcy court's interlocutory order is not a final judgment for purposes of appeal under section 158(d). *In re Stable Mews Assocs.*, 778 F.2d 121, 122 (2d Cir. 1985); *In re Cash Currency Exchange, Inc.*, 762 F.2d 542, 545 (7th Cir.) (addressing 28 U.S.C. § 1293(b), predecessor to § 158(b)), *cert. denied sub nom. Fryzel* v. *Cash Currency Exchange, Inc.*, 474 U.S. 904 (1985). Consequently, this Court does not have jurisdiction to hear an appeal from a district court decision affirming an interlocutory order of the bankruptcy court. *In re Chateaugay Corp.*, 876 F.2d 8, 9 (2d Cir. 1989) (per curiam); *Stable Mews*, 778 F.2d at 122. We must, therefore, determine whether the orders of the bankruptcy court were final under 28 U.S.C. § 158(d) in order to ascertain our jurisdiction in this matter.

Finality in the bankruptcy context is determined by a less rigid standard than that applicable to other proceedings. 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice & Procedure* § 3926, at 112 (1977 & Supp. 1990). Orders in bankruptcy cases may be immediately appealed if they resolve discrete disputes within the larger case. *In re Moody*, 817 F.2d 365, 367-68 (5th Cir. 1987); *Cash Currency Exchange*, 762 F.2d at 546. The disposition of a discrete dispute is generally considered to be the resolution of an adversary proceeding within the bankruptcy action. *Moody*, 817 F.2d at 367-68; *In re Saco Local Development Corp.*, 711 F.2d 441, 443-46 (1st Cir. 1983) (decision based on 28 U.S.C. § 1293, predecessor to § 158). This pragmatic approach to finality permits the courts to address the specific needs of complex bankruptcy proceedings, but does not overcome the general aversion to piecemeal appeals. *In re White Beauty View, Inc.*, 841 F.2d 524, 526 (3d Cir. 1988). In the action now before us, the discrete dispute is the adversary proceeding commenced by LTV in 1988 consisting of two claims. The bankruptcy court's orders granting partial summary judgment did not resolve the

dispute, but instead disposed of only one of the pending claims. The issue of whether Benefit Trust must reimburse LTV for retired employee benefit payments made after the expiration of the Wage Agreement and before the August 4, 1988 bankruptcy court order still remains to be decided.

Bankruptcy Rule 7054 states that Rule 54(b) of the Federal Rules of Civil Procedure, which concerns judgments involving multiple claims or multiple parties, applies in adversary proceedings. 11 U.S.C. Rule 7054 (1988). Rule 54(b) states:

> When more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b). An order granting partial summary judgment is interlocutory. *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737, 742-43 (1976); 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.08[1] (1990). According to the terms of Rule 54(b), an interlocutory order does not become final until the court determines that there is no just reason for delay and expressly directs entry of a final judgment. *In re King City Transit Mix, Inc.*, 738 F.2d 1065, 1066 (9th Cir. 1984) (per

curiam). That finality determination must be made in the context of the less rigid finality requirements of section 158(d), rather than section 158(d), rather than section 1291, because section 158(d) is the relevant standard of finality in bankruptcy adversary proceedings. 28 U.S.C. § 158(d) (1988); *In re Wood and Locker, Inc.*, 868 F.2d 139, 145 (5th Cir. 1989).

In the appeal now before us, the August 1 and August 4 orders granting partial summary judgment in favor of LTV are interlocutory orders and remain interlocutory until the bankruptcy court determines that the orders are final within the context of section 158(d). *Wood and Locker*, 868 F.2d at 145. Because the parties did not petition the bankruptcy court for a determination of "no just reason for delay" and the entry of a final judgment pursuant to 54(b), we do not have jurisdiction to hear this appeal.

Appellant Benefit Trust contends that we have jurisdiction under *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201 (1848). *Forgay* treated as final an appeal from an order that directed immediate transfer of land, slaves and money and ordered an accounting, despite the absence of the accounting and judgment. *Id.* Benefit Trust correctly states that *Forgay* has been applied in the bankruptcy context and has been extended by several courts. In this Circuit, however, we have limited *Forgay* to its facts. *See Cinerama, Inc.* v. *Sweet Music, S.A.*, 482 F.2d 66, 71 (2d Cir. 1973). We decline to extend the *Forgay* analysis to this case. In contrast to *Forgay*, the pending action does not involve a transfer of real property or chattels. Furthermore, *Forgay* applies to the partial adjudication of a single claim, while this action involves multiple claims. *See Zwack* v. *Kraus Bros. & Co.*, 237 F.2d 255, 262 (2d Cir. 1956).

The Benefit Trust alternatively asserts that the exception to the final judgment rule developed in *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964), applies

to this appeal. Benefit Trust incorrectly suggests that *Gillespie* permits an appeal from an interlocutory order based on a balancing of the inconvenience and cost of piecemeal review against the danger of denying justice by delay. Granted, *Gillespie* encourages a practical approach to finality. The Supreme Court, however, has expressly rejected the view that *Gillespie* permits the court to decide close cases of finality by an ad hoc balancing, and has recommended that *Gillespie* be limited to its unique facts. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 477 n.30 (1978); 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.12, at 110 (1990).

For the foregoing reasons, it is clear that we lack jurisdiction to hear the appeal. In other cases, however, we have held that subsequent entry of a final judgment following a remand is sufficient to validate a premature notice of appeal if the opposing party is not prejudiced by the decision. *See Leonhard* v. *United States*, 633 F.2d 599, 611 (2d Cir. 1980) ("In the absence of prejudice to the nonappealing party, this Court too has declined to dismiss premature notices of appeal where subsequent actions of the district court have imbued to order appealed from with finality."), *cert. denied*, 451 U.S. 908 (1981). We have adopted this remedy when a notice of appeal was filed before a 54(b) certification was obtained. *Gumer* v. *Shearson, Hammill & Co.*, 516 F.2d 283, 285 (2d Cir. 1974) (technical deficiency easily remedied by remand). This approach has been followed in other circuits as well.[2]

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[2] *Martinez* v. *Arrow Truck Sales, Inc.*, 865 F.2d 160, 161-62 (8th Cir. 1988) (per curiam); *Lewis* v. *B.F. Goodrich Co.*, 850 F.2d 641, 643-46 (10th Cir. 1988) (in banc); *Crowley Maritime Corp.* v. *Panama Canal Comm'n*, 849 F.2d 951, 954 (5th Cir. 1988); *Tidler* v. *Eli Lilly & Co.*, 824 F.2d 84, 85-86 (D.C. Cir. 1987); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *Wisconsin*, 760 F.2d 177, 180-81 (7th Cir. 1985); *Freeman* v. *Hittle*, 747 F.2d 1299, 1302 (9th Cir. 1984); *Tilden Financial Corp.* v. *Palo Tire Serv., Inc.*, 596 F.d 604, 607 (3d Cir. 1979). *But see Oak Constr. Co.* v. *Huron Cement Co.*, 475 F.2d 1220, 1221 (6th Cir. 1973) (per curiam) (lack of jurisdiction cannot be cured by belated 54(b) certification).

We find it appropriate to provide the parties with an opportunity to cure the jurisdictional defect. *Accord In re Durability, Inc.*, 893 F.2d 264, 266 (10th Cir. 1990) (54(b) certification not obtained prior to appeal to Court of Appeals, parties permitted time to secure certification). Both the bankruptcy court and the district court expressed belief that the orders were appealable. It is necessary, however, to comply with the technical requirements of Rule 54(b).

We accordingly dismiss this appeal without prejudice to its being reinstated upon securing the entry of a final judgment from the bankruptcy court. *See id.* Upon reinstatement, this panel will resolve the appeal on the merits without further briefing or oral arguments. *See General Motors Corp.* v. *Dade Bonded Warehouse, Inc.*, 498 F.2d 327, 328 (5th Cir. 1974).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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88 CIV. 8695 (SWK)

IN RE: CHATEAUGAY CORPORATION, REOMAR, INC., THE LTV CORPORATION, *et al.*,
Debtors.

LTV STEEL COMPANY, INC., BCNR MINING CORPORATION, NEMACOLIN MINES CORPORATION, and TUSCALOOSA ENERGY CORPORATION,
Plaintiffs-Appellees.

—against—

JOSEPH P. CONNORS, JR., DONALD E. PIERCE, JR., WILLIAM MILLER, WILLIAM B. JORDAN and PAUL R. DEAN, as Trustees of the UNITED MINE WORKERS OF AMERICA BENEFIT PLAN AND TRUST, the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,
Defendants-Appellants,

and the UNITED MINE WORKERS OF AMERICA,
Defendant-Appellee.

In Proceedings For A Reorganization Under Chapter 11. Cas. Nos. 86 B 11270 through 86 B 11334 (BRL) Inclusive, 86 B 11402 and 86 B 11464 (BRL)

Ad. Pro. No. 88-5502A

MEMORANDUM OPINION AND ORDER

[Filed Mar. 9, 1990]

SHIRLEY WOHL KRAM, U.S.D.J.

This is an appeal of two final orders issued by Chief Judge Burton R. Lifland of the United States Bankruptcy Court for the Southern District of New York. The orders were issued in an adversary proceeding involving BCNR Mining Corporation, Nemacolin Mines Corporation, Tuscaloosa Energy Corporation (collectively "the Mining Companies"), their parent company LTV Steel Corporation ("LTV"), the United Mine Workers of America ("the UMWA"), and the United Mine Workers of America 1974 Benefit Plan and Trust ("the Plan & Trust"). The first order was issued from the bench on August 1, 1988, and so ordered on August 3, 1988 ("the August 1 Order"). This order granted partial summary judgment to the Mining Companies and LTV on count one of their complaint, holding that the Mining Companies were not legally obligated to pay the health benefits of its retirees. Transcript of Aug. 1, 1988 Hearing at 41, 49. The second order was issued orally on August 4, 1988 and was so ordered on August 12, 1988 ("the August 4 Order"). This order granted UMWA's cross-motion for summary judgment, holding that the Plan & Trust is liable to pay the retirees' benefits. Transcript of Aug. 4, 1988 Hearing at 19-20. Pursuant to 28 U.S.C. § 158, the Plan & Trust appeals both of these orders, which this Court considers *de novo*. Bankr. R. 8013; *Brunner v. New York State Higher Educ. Serv. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

Background

The Mining Companies are debtors-in-possession reorganizing under Chapter 11 of the United States Bankruptcy Code. 11 U.S.C. § 1 *et seq.* The Plan & Trust is a collectively bargained, multiemployer welfare benefit plan that provides health benefits to certain retirees of the UMWA and their surviving spouses.[1] The Plan & Trust

[1] Eligible retirees are covered for their lifetime and surviving spouses are also covered for their lifetime unless they remarry.

was established by the National Bituminous Coal Wage Agreement ("Wage Agreement") of 1974 and has continued pursuant to the 1978, 1981, 1984, and 1988 Wage Agreements. The UMWA is a labor organization which represents and has historically represented the employees and retired employees of the Mining Companies in collective bargaining.

The Mining Companies were signatories to the 1984 Wage Agreement, requiring employers to provide health benefits to their retirees through health benefit plans to be obtained from insurance companies. Pursuant to this agreement, the LTV Companies established and maintained health benefit plans for the retirees of each of the Mining Companies. The 1984 Wage Agreement also provided that the Plan & Trust would pay the health benefits of retirees who would not otherwise receive benefits because their last signatory employers are "no longer in business." Under the 1984 Wage Agreement an employer would be considered "no longer in business" only if it:

> (a) has ceased all mining operations and has ceased employing persons under this Wage Agreement, with no reasonable expectation that such operations will start up again; and
>
> (b) is financially unable (through either the business entity that has ceased operations as described in subparagraph (a) above, including such company's successors or assigns, if any, or any other related division, subsidiary, or parent corporation, regardless of whether covered by this Wage Agreement or not) to provide health and other non-pension benefits to retired miners and surviving spouses.

1984 Wage Agreement, Article XX (c)(3)(ii), at 112.

These benefits are guaranteed for life pursuant to the National Bituminous Coal Wage Agreements ("Wage Agreements"). *See* 1984 Wage Agreement, art. XX(h), at 137 *et seq.* (General Descriptions of Pension Plans).

The Mining Companies ceased operations in 1986. LTV and its subsidiaries, including the Mining Companies, filed a Chapter 11 petition on July 17, 1986. LTV then unilateraly terminated the health benefits of 78,000 of its retirees and the retirees of its subsidiaries. LTV asserted that it was not permitted to pay such benefits without authorization of the Bankruptcy Court. Immediately, thereafter, members of Congress introduced three bills, H.R. 5276, H.R. 5283, and S. 2690, that would have required LTV to reinstate the retiree health benefits that it had unilaterally terminated. The Senate passed its version on July 30, 1986. At the same time, the UMWA began a strike. On July 30, 1986, LTV requested that the Bankruptcy Court authorize it to pay the benefits retroactive to July 17, 1986. LTV resumed paying these benefits and continued until August 1, 1988.

When the 1984 Wage Agreement expired on January 31, 1988, the Mining Companies did not enter into the successor agreement. The Mining Companies asserted that they were no longer contractually or legally obligated to provide retiree health benefits. The Mining Companies, however, continued to do so pending judicial resolution of this question.

On June 23, 1988, LTV and the Mining Companies (collectively "the Debtors") commenced an adversary proceeding against the Plan & Trust and the UMWA seeking relief on two counts. In count one, the Debtors sought declaratory relief on two issues. First, they sought a declaration that the Mining Companies' obligation to pay the retirees' benefits terminated upon the expiration of the 1984 Wage Agreement. Second, the Debtors sought a declaration that if the Mining Companies' retirees were entitled to the benefits, the Plan & Trust was obligated to provide such benefits. In count two the Debtors sought to recover from the Plan & Trust the amount paid by LTV to the retirees subsequent to the expiration of the 1984 Wage Agreement on January 31, 1988.

On July 18, 1988, the Debtors moved for partial summary judgment on count one of their complaint. The Debtors sought summary judgment on the issue of whether LTV was obligated to pay the retirees' health benefits following the expiration of the 1984 Wage Agreement. The UMWA, on behalf of its retirees, answered and cross-claimed seeking to compel the Plan & Trust to provide the retirees' benefits. On July 29, 1988, the UMWA moved for summary judgment on its cross-claim.

On August 1, 1988, following oral argument, the Bankruptcy Court granted the Mining Companies' motion for partial summary judgment from the bench. Transcript of Aug. 1, 1988 Hearing at 40-41. The Bankruptcy Court found that the Mining Companies' obligation to pay benefits ceased on January 31, 1988.[2]

At the hearing, the UMWA expressed concern that the retirees would have no source of payment of their benefits. The UMWA was concerned because the Bankruptcy Court found that LTV was not required to pay the benefits and the Plan & Trust asserted that it was not obligated to do so. *Id.* at 23-25, 43. Given these circumstances, Chief Judge Lifland decided to shorten the time for response to UMWA's summary judgment motion, making the motion returnable at 2:00 p.m. on Thursday, August 4, 1988.[3] *Id.* at 42, 46, 48. The Plan & Trust petitioned this Court seeking a stay of the August 4, 1988 Hearing. The motion for a stay was denied. Order of Judge Louis L. Stanton dated August 4, 1988.

At the hearing on August 4, 1988, the Bankruptcy Court granted the UMWA's summary judgment motion in its entirety. Transcript of Aug. 4, 1988 Hearing at 19-20, 23. The Bankruptcy Court also granted the Min-

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[2] This ruling was so ordered two days later.

[3] The UMWA summary judgment motion, which contained no return date, had been served on all the parties on Friday morning, July 29, 1988.

ing Companies' second request for declaratory relief, i.e., that the Plan & Trust was obligated to provide the health benefits for the retirees. *Id.* On August 12, 1988 Chief Judge Lifland so ordered his prior ruling.

The Plan & Trust has complied with this Order and has been paying the retirees' benefits since August 4, 1988. The Plan & Trust stipulated a withdrawal of a counterclaim it had filed, in order to meet the finality requirement of 28 U.S.C. § 158.[4] This Court subsequently entered an order finding that the August 1 and August 4 Orders are final orders within the meaning of § 158. Order of Judge Whitman Knapp at 2, dated October 12, 1988. The Plan & Trust appeals both orders of the Bankruptcy Court pursuant to § 158.

Discussion

The Plan & Trust presents four arguments in favor of reversing the August 1 and August 4 Orders of the Bankruptcy Court. The Plan & Trust first asserts that the August 1 Order violates the Retiree Benefits Bankruptcy Protection Act of 1988 (the "Retiree Protection Act" or the "Act").[5] Second, the Plan & Trust argues that the Bankruptcy Court did not have subject matter jurisdiction to issue its August 4 order because it was not a core proceeding. The Plan & Trust also claims that

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[4] This section states:

> The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

28 U.S.C. § 158(a).

[5] Pub. L. No. 100-334, 102 Stat. 610 (June 16, 1988) *codified in* 11 U.S.C. §§ 1101 *et seq.*

it was denied a full and fair opportunity to litigate the issue of the August 4 Order because the Bankruptcy Court shortened the time for response to the UMWA's summary judgment motion. Finally, the Plan & Trust argues that it is not liable to pay the retirees' benefits because the Mining Companies do not meet the Wage Agreement's definition of "no longer in business."

The UMWA, on behalf of its retirees, filed a brief with this Court asserting that the August 1 and August 4 Orders should be affirmed. The UMWA argues that the Plan & Trust is obligated to pay the retirees' benefits pursuant to the 1984 Wage Agreement. The UMWA asserts that the Plan & Trust is collaterally estopped from raising the argument that it is not liable for the retirees' benefits because the issue has been fully and fairly litigated by the Plan & Trust on three other occasions.[6] The UMWA further argues that the Bankruptcy Court properly had subject matter jurisdiction because the issue raised was a core matter. Finally, the UMWA argues that the Plan & Trust was not deprived a full and fair opportunity to litigate the issue raised by the UMWA's summary judgment motion due to the shortened time to respond to the UMWA's summary judgment motion.

The Debtors submitted a brief also asserting that the August 1 and August 4 Orders should be affirmed. The Debtors' first argument is that the Retiree Protection Act does not apply to the present case and therefore they are not obligated to provide the retirees' benefits. The Debtors argue further that even if the Act applies, it was not intended to compel debtors to make retiree health bene-

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[6] *District 29, United Mine Workers of America v. United Mine Workers of America 1974 Benefit Plan and Trust*, 826 F.2d 280 (4th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988); *Schifano v. United Mine Workers of America 1974 Benefit Plan and Trust*, 655 F. Supp. 200 (N.D. W.Va. 1987); *Crockett v. Vecellio and Grogan*, slip op. No. 1, 85-1448 (S.D. W.Va. Feb. 4, 1987).

fit payments if they are not legally obligated to do so. The Debtors also repeat the UMWA's arguments with respect to collateral estoppel, subject matter jurisdiction of the Bankruptcy Court to enter a final determination, and full and fair opportunity to litigate.

I. The August 1, 1988 Order

The Plan & Trust's argument for reversal of the August 1 Order is that it violates the Retiree Protection Act. The Plan & Trust claims that the Act applies to this case and that it requires the Mining Companies to pay the retiree health benefits. The Debtors reply that the Act is not applicable to actions occurring before its effective date. The Debtors also argue that the Retiree Protection Act does not apply because the Mining Companies are no longer contractually obligated to pay the retirees' benefits. They argue that Congress did not intend the Act to require debtors to pay the benefits when there is no legal obligation to do so.

The major portion of the Retiree Protection Act is contained in section 2 of the Act. This section amends the Bankruptcy Code by adding § 1114 to it. Section 4(b) of the Retiree Protection Act provides that "[t]he amendments made by section 2 shall not apply with respect to cases commenced . . . before [June 16, 1988]." The Mining Companies had filed a petition for reorganization under Chapter 11 almost two years earlier on July 17, 1986. Therefore, section 2 of the Retiree Protection Act is not applicable to the present case, as the Plan & Trust concedes.

The Plan & Trust, however, asserts that section 3 of the Act obligates the Mining Companies to pay. This section amends § 608(a) of the second Title VI of the "Joint resolution making continuing appropriations for the fiscal year 1987 and for other purposes." Pub. L. No. 99-591, 100 Stat. 3341-74 (October 30, 1986). This was stop-gap legislation which Congress passed pending

the enactment of the Retiree Protection Act. Section 3 applies to certain cases which were in Chapter 11 bankruptcy at the time the Act was enacted. The Debtors concede that section 3 does apply to the case, but they argue that it does not obligate them to continue to provide retiree benefits. The issue thus before this Court on the August 1 Order is whether section 3 of the Act requires a debtor-in-possession to continue to pay retiree health benefits pursuant to a collective bargaining agreement for the duration of the Chapter 11 proceeding, if the collective bargaining agreement, and thus the contractual obligation, expires during the proceeding.

The Plan & Trust argues that the Act does require debtors to pay retiree health benefits even when there is no obligation to do so. An analysis of the legislative history of the Retiree Protection Act shows that this is not what Congress intended. Congress passed the Retiree Protection Act, and the prior stop-gap legislation, in order to prevent the unilateral termination or modification of a Chapter 11 debtor's obligation to pay retiree health benefits without notice and an opportunity for the retirees to protect their interests. *See, e.g.*, Comments of Senator Heinz, 134 Cong. Rec. S 6827 (daily ed. May 26, 1988) ("The bill will protect retirees from unilateral termination of benefits by a company filing a Chapter 11 bankruptcy petition.").

In this case, the termination of the Wage Agreement, and thus the Mining Companies' obligation to pay, is not unilateral action by the Debtors but a pre-existing contractual provision. Congress did not intend for the Retiree Protection Act to reach this type of action. Senator Byrd, a cosponsor of the Retiree Protection Act, stated that

> [w]hile thousands of retirees could lose their medical and life insurance benefits as a result of their employer's actions under a chapter 11 bankruptcy filing, these companies have a *legal* and *contractual* obliga-

> tion to their retirees . . . . This legislation will not guarantee continuation of these benefits, but it will provide a mechanism that will allow the retirees' position to be heard.

133 Cong. Rec. S 2237-38 (Feb. 19, 1987) (remarks of cosponsor Senator Byrd upon the introduction of the Senate version of the bill which became the Retiree Protection Act) (emphasis added). According to the provisions of the Wage Agreement, the employer is responsible for maintaining retiree health benefit plans which "shall be guaranteed *during the term of this Agreement*," which expired on January 31, 1988.[7] 1984 Wage Agreement, Article XX(c)(3)(i), at 111 (emphasis added).

The legislative history reveals that the Retiree Benefits Bankruptcy Protection Act of 1988 does not require the LTV to continue to pay retiree benefits in this case. Chief Judge Lifland's decision that the Mining Companies were no longer contractually obligated to provide retiree benefits was correct.

II. The August 4, 1988 Order

The Plan & Trust presents three arguments upon which it requests this Court to reverse the August 4 Order of the Bankruptcy Court. The Plan & Trust claims that the Bankruptcy Court did not have subject matter jurisdiction to issue a final determination, that the Plan & Trust was not afforded a full and fair opportunity to prepare for he hearing, and that based on the language of the Wage Agreement the Plan & Trust is not obligated to pay the benefits for the Mining Companies' retirees.

A. Subject Matter Jurisdiction of the Bankruptcy Court

In order for the Bankruptcy Court to have subject matter jurisdiction over the issues of an adversary pro-

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[7] The Mining Companies paid the retiree health benefits through August 4, 1988.

ceeding, the issues must be core matters. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *In re Kaiser*, 722 F.2d 1574, 1582 (2d Cir. 1983); *In re Marine Pollution Services Inc.*, 88 Bankr. 588, 595-96 (S.D.N.Y. 1988). The determination of whether a case is a core proceeding is governed by 28 U.S.C. § 157. Section 157 contains a partial list of matters which constitute core proceedings. Chief Judge Lifland determined that this case was a core proceeding under § 157 (b)(2)(A) and (O).[8]

The Plan & Trust claims that the August 4 Order was not a core proceeding and therefore the Bankruptcy Court lacked subject matter jurisdiction to issue a final order. The Plan & Trust concedes that only the August 1 Order involved a core matter because it concerned the liability of the Mining Companies. However, the Plan & Trust argues that because the August 4 hearing was an independent proceeding involving only the liability of the Plan & Trust, it was not a core proceeding.

The Mining Companies argue that the August 4 Order was a core proceeding under 28 U.S.C. § 157. They assert that because the Bankruptcy Court found that the issues involved in the August 4 Order were encompassed in the August 1 hearing, the August 4 hearing was a core proceeding. Further, the Mining Companies argue that the resolution of the UMWA's cross-claim was a core proceeding independent of its inclusion in the August 1 Order. The Mining Companies claim that the

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[8] These provisions state:

> (2) Core proceedings include, but are not limited to—
>
> (A) matters concerning the administration of the estate;
>
> . . .
>
> (O) other proceedings affecting the liquidation of assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

28 U.S.C. § 157 (b)(2)(A) and (O) (1988).

resolution of the issue involved in the August 4 Order was necessary for LTV's attempt to recover the payments it made between January 31 and August 4, 1988. Because this resolution was necessary for the administration of the estates, the Mining Companies assert that the August 4 Order was a core proceeding.

The UMWA argues that this was a core proceeding because it bears on the relationship between a creditor of the estate and satisfaction of its claim and thus affects the estate. Furthermore, the UMWA argues that its cross-claim (the subject of the August 4 hearing) was made pursuant to Bankr. R. 7013 and Fed. R. Civ. P. 13(g), which permit cross-claims against co-parties if they involve the subject matter of the original action. The UMWA argues that because the subject matter of the cross-claim is identical to that of the complaint, it is a core proceeding.

The issues that were raised at the August 4 hearing were also an integral part of the August 1 hearing, which was a core proceeding. In fact, the hearing really constituted one proceeding, the determination of count one of the Debtors' complaint. The two orders in combination constitute a core matter under 28 U.S.C. § 157 (b)(2)(A) and (O). The orders determined whether the Mining Companies were liable, and if they were not, whether the Plan & Trust would be liable. The Orders were a determination of the Mining Companies' obligation to pay retiree health benefits which is a core proceeding. *See Creasy v. Coleman Furniture Corp.*, 763 F.2d 656, 662 (4th Cir. 1985) (trustee's action to adjudicate rights to pension fund assets arises under Title 11).

The August 4 hearing constituted a core proceeding even independent of the August 1 Order. From January 31, 1966 (expiration of the 1984 Wage Agreement) to August 4, 1988, LTV paid the retiree benefits. The August 1 Order determined that the Mining Companies were

not obligated to make retiree benefit payments after the expiration of the 1984 Wage Agreement. In order for LTV to recover the cost of continuing to provide the retiree benefits after its contractual obligation ended, it was necessary for the Bankruptcy Court to determine if the Plan & Trust was liable for the benefits. The resolution of the Plan & Trust's liability was necessary to determine whether LTV could recover from the Plan & Trust the money it paid after January 31, 1988. The resolution of the Plan & Trust's liability was a core proceeding because it was an attempt by the Mining Companies to collect a post-petition debt. The collection of a post-petition debt is a core proceeding under 28 U.S.C. § 157 (b) (2) (A) and (O). *In re Arnold Print Works, Inc.*, 815 F.2d 165, 168 (1st Cir. 1987); *In re Sattler, Inc.*, 82 Bankr. 229, 232 n.4 (Bankr. S.D.N.Y. 1988). In *Arnold Print* the court held that the debtor-in-possession's action to collect a post-petition debt was a core proceeding under § 157 (b) (2) (A), "because it involves a claim that arose out of the administrative activities of a debtor-in-possession." *Arnold Print*, 815 F.2d at 168. The payment of retiree benefits by the Debtors was an administrative activity. The recovery of those monies which the Debtors paid after their obligation had ceased is a core proceeding. Also, LTV's ability to recover the amount paid is a matter that effects the final administration of the estate under § 157 (b) (2) (A). This case is similar to *In re Mesa Intercontinental, Inc.*, 79 Bankr. 669 (Bankr. S.D. Tex. 1987), where the court held that a suit between two non-debtors over money that one owed the debtor was a core proceeding. *Id.* at 671. In *Mesa*, the suit between non-debtors was a core matter because the resolution of the issue was necessary to finally administer the estate. *Id.* at 671. Determination of the Plan & Trust's liability is necessary to finally administer the Mining Companies' estates.

Chief Judge Lifland correctly ruled that the August 4 hearing and order was a core proceeding.

B. Full and Fair Opportunity to Litigate

The August 4 order completed a determination of count one of the complaint and it fully resolved the UMWA's cross motion. It was brought on by a summary judgment motion that the UMWA had filed and served on the parties seven days prior. Federal Rule of Civil Procedure 56 provides that on a motion for summary judgment ten days' notice shall be provided. Bankruptcy Rule 7056 makes Rule 56 applicable to adversary proceedings in bankruptcy court. The Plan & Trust claims that it was denied a full and fair opportunity to litigate the issue raised at the August 4 hearing because it did not receive ten days to respond to the summary judgment motion as required by Rule 56. For this reason the Plan & Trust contends that the August 4 Order should be reversed.

Bankr. R. 9006 (c) (1) allows the bankruptcy court to shorten the length of time required or allowed for any act by the Bankruptcy Code.[9] This rule applies to the present case and allowed Chief Judge Lifland to shorten the time for the Plan & Trust to respond to the summary judgment motion upon a showing of cause. The Bankruptcy Court did inquire into, and found, a showing of cause. During the August 1 hearing the issue of the Plan & Trust's liability was not fully raised because the Plan & Trust claimed that it had prepared only to address the issue of the Mining Companies' liability at the hearing. Chief Judge Lifland was ready to address the Mining Companies' liability as well as the Plan & Trust's liability at the first hearing. The Bankruptcy Court allowed the issue of the Plan & Trust's liability to be heard at a

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[9] This rule provides that:

> Except as provided in paragraph (2) of this subdivision, when an act is required or allowed to be done at or within a specified time by these rules or by a notice given thereunder or by order of court, the court for cause shown may in its discretion with or without motion or notice order the period reduced.

Bankr. R. 9006 (c)(1) (1988).

second hearing because the Plan & Trust claimed that it was not on notice that the August 1 hearing involved both issues. Due to the severe hardship that would be inflicted upon the retirees if their benefits were terminated, the Bankruptcy Court shortened the time to respond to the summary judgment motion of the UMWA.[10]

Furthermore, the Plan & Trust has had ample opportunity to litigate the issue of its liability under the Wage Agreement. This issue had been substantially litigated in other forums by the Plan & Trust prior to the August 4 hearing.[11] The ten day period to respond to a Rule 56 motion can be shortened in extraordinary cases when ten days' notice is impractical and there is no prejudice to the non-moving party. *Cf. Gutwein v. Roche Laboratories*, 739 F.2d 93, 95 (2d Cir. 1984) (stating that ten day period could be shortened in extraordinary cases but holding that it wasn't true in the case before the panel). Such a situation, however, existed in the present case.

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[10] In granting the shorten response time Chief Judge Lifland stated:

> I think it is intolerable to leave these retirees in a squeeze.
>
> . . .
>
> Mr. Hanrahan, you have indicated and shown a wonderful ability to marshal your firm's talents with respect to briefing.
>
> As a matter of fact, when I gave you time for a brief last week I think you handed it up to me at the very moment I gave you some extra time to respond by way of brief.
>
> But I think you are fully familiar with all of the issues here and it shouldn't create a great burden. Actually, everything that is the subject of the Mine Workers' Motion for Summary Judgment is really the subject and dealt with pursuant to count one [of the Debtors' complaint].

Transcript of Aug. 1, 1988 Hearing at 47-48.

[11] *District 29, United Mine Workers of America v. United Mine Workers of America 1974 Benefit Plan and Trust*, 826 F.2d 280 (4th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988); *Schifano v. United Mine Workers of America 1974 Benefit Plan and Trust*, 655 F. Supp. 200 (N.D. W.Va. 1987); *Crockett v. Vecellio and Grogan*, Slip Op. No. 1, 85-1448 (S.D. W.Va. Feb. 4, 1987).

The Bankruptcy Court had determined that the Mining Companies were not obligated to pay the retiree benefits, thus the retirees were in danger of losing their benefits. In order to remedy this dilemma, Chief Judge Lifland stayed his August 1 decision, forcing the Debtors to continue to make payments that they were not legally obligated to make. The Court also made the UMWA's summary judgment motion returnable August 4, 1988. The Plan & Trust was not prejudiced by the shortened response time because there was a full record, the issues were raised in the August 1 hearing, and the Plan & Trust had extensively litigated the same issue in other forums. Furthermore, unlike the Federal Rules of Civil Procedure, which were at issue in *Gutwein*, the Bankruptcy Rules contain a provision that allows the bankruptcy court to shorten the time to respond to summary judgment motions. Bankr. R. 9006 (c) (1) (1988).

The Bankruptcy Court did not abuse its discretion when in shortened the time to respond to the UMWA's summary judgment, and the Plan & Trust was not denied a full and fair opportunity to litigate the issue of its liability under the Wage Agreements.

C. The Plan & Trust's Obligation

The Plan & Trust claims that it is only liable to provide retiree health benefits when the retirees' last signatory employer meets the "no longer in business" requirments set forth in the Wage Agreement, even if the employer no longer has a legal or contractual obligation to pay the benefits. In the present case, the Plan & Trust alleges that the Mining Companies are still in business and thus it is not required to provide the benefits even though the Mining Companies have no obligation to pay. The Plan & Trust argues that the retirees are not entitled to health benefits because of the requirement that the last signatory employer is "no longer in business."

The UMWA and the Debtors argue that the Plan & Trust is required to pay where the employer no longer has such an obligation. Therefore, they argue that the Plan & Trust is obligated to pay the retiree health benefits even though the Mining Companies do not meet the contractual definition of "no longer in business." The UMWA and the Debtors argue that the Plan & Trust was established to provide benefits for "orphaned" pensioners who would otherwise be deprived of their guaranteed lifetime benefits.

The interpretation of the "no longer in business" provision of the 1984 Wage Agreement has been fully adjudicated in other forums by the Plan & Trust, most notably in *District 29, United Mine Workers of America v. United Mine Workers of America 1974 Benefit Plan and Trust*, 826 F.2d 280 (4th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988) (*"Royal Coal II"*). At issue in *Royal Coal II* was a provision of the 1981 Wage Agreement which is identical to the provision in the 1984 Wage Agreement. The issue resolved in *Royal Coal II* is the same issue now raised by the Plan & Trust, that is, whether the Plan & Trust must provide retiree health benefits under the Wage Agreement where the parent or successor corporation of the former employer is financially able to provide such benefits, but is not legally obligated to do so because it is no longer a signatory to the Wage Agreement. The Fourth Circuit held in *Royal Coal II* that the Plan & Trust was liable to provide retiree health benefits under these circumstances. This issue has been raised by the Plan & Trust in other cases in which the courts have also determined that the Plan & Trust is obligated to provide the benefits in similar circumstances. *Schifano v. United Mine Workers of America 1974 Benefit Plan and Trust*, 655 F. Supp. 200 (N.D. W.Va. 1987); *Crockett v. Vecellio and Grogan*, Slip Op. No. 1, 85-1448 (S.D. W.Va. Feb. 4, 1987). The Plan & Trust was a defendant in *Royal Coal II*, *Schifano*, and *Crockett*, and as such actually litigated this issue of contractual interpretation.

Chief Judge Lifland held that the Plan & Trust's argument concerning the "no longer in business" provision failed on two grounds. First, he held that the Plan & Trust's argument failed on the merits.[12] Moreover, he held that collateral estoppel is applicable to this case and that the Plan & Trust is collaterally estopped from raising this argument because of the Fourth Circuit's resolution of it.[13]

Collateral estoppel precludes a party from raising the same issue in a subsequent case which was fully and fairly litigated in a prior case to which it was a party. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). In *Parklane* the Supreme Court held that the doctrine of offensive collateral estoppel could be used by a plaintiff who was not a party to the prior litigation to preclude the defendant from raising an issue which had already been fully litigated in the prior action. *Id.* at 332-33. The Supreme Court held that offensive collateral estoppel could be used in cases where the defendant has fully litigated the issue in another proceeding, it was not possible for the plaintiff to join in the prior action, and the appli-

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[12] Chief Judge Lifland stated that "I need not even get into the issue of collateral estoppel, offensive or otherwise, because I believe on the merits that the matter is totally dispositive, at least as far as the union's cross-motion is concerned." Transcript of Aug. 4, 1988 Hearing at 20.

[13] Chief Judge Lifland stated that

> in reviewing the doctrine of collateral estoppel I do find that it's applicable here. This matter has been litigated in other Courts. It is just about on all fours.
>
> The attempts by the Trust to show that there is a difference here from the matters considered by all of the Courts below the Fourth Circuit and above the Fourth Circuit amount to essentially hair splitting. And if I might be permitted and you may find me misguided, Mr. Hanrahan, the hairs out is a wig, I think are artificial, frankly, and I do find that the doctrine of collateral estoppel is very appropriate here.

Transcript of Aug. 4, 1988 Hearing at 20.

cation of offensive collateral estoppel is not unfair to the defendant. *Id.* at 331.

The present case is precisely the type in which offensive collateral estoppel is permitted under *Parklane*. The issue was fully litigated by the Plan & Trust in *Royal Coal II*, it was not possible for the Debtors to join in *Royal Coal II*, and the application of offensive collateral estoppel is not unfair to the Plan & Trust. The Plan & Trust's attempt to relitigate this issue which it has fully adjudicated in several other forums, offends the central policy underlying collateral estoppel, that is promoting judicial economy by preventing needless litigation. *Id.* at 326.

Furthermore, even if the Plan & Trust were not collaterally estopped from raising this issue, its argument lacks merit to convince this Court to part with the Fourth Circuit precedent. The terms of the Wage Agreements make it clear that the retiree benefits are intended to be lifetime benefits. The Wage Agreements state in several places that "pensioner[s] shall be entitled to retain [their] Health Services card for life." 1984 Wage Agreement, art. XX(h), at 137 (General Description of Plan & Trust). The Wage Agreements also state that "[a] surviving spouse will be entitled to retain a Health Services card until death or remarriage, subject to the $500 earnings limit." *Id.* at 138. The parties who negotiated the Wage Agreements also intended that the Plan & Trust was to provide the retiree benefits when the employers were no longer able to do so. *Royal Coal II*, 826 F.2d at 282-83. The parties that negotiated the Wage Agreements did not intend to create a loophole that would allow the Plan & Trust to escape its liability to provide the retiree health benefits when the employers were no longer obligated to do so. *Id.* at 283.

The Bankruptcy Court therefore was correct in holding that the Plan & Trust is liable to provide the retiree health benefit.

Conclusion

For the aforementioned reasons, the Bankruptcy Court's August 1 and 4 orders are affirmed.

SO ORDERED

/s/ Shirley Wohl Kram
SHIRLEY WOHL KRAM
United States District Judge

DATED: New York, New York
March 6, 1990

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 86 B 11270 (88-5502)
IN THE MATTER OF CHATEAUGAY, *et al.*,
Debtors.

(v. JOS. P. CONNORS, *et al*)
Mtn by Debtor for S/J

August 1, 1988
United States Custom House
One Bowling Green
New York, New York 10004

Before HON. BURTON R. LIFLAND, Bankruptcy Judge

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[5] PROCEEDINGS

MS. KATZ: Good morning, Your Honor.

THE COURT: Good morning.

MS. KATZ: On before you for hearing this morning is a motion by three Debtor mining companies; BCWR Mining Corporation, Nemacolin Mines Corporation and Tuscaloosa Energy Corporation, seeking a declaration that their obligation to pay health and life insurance ben-

efits to approximately 865 retirees, which expired on January 31, 1988, the expiration date of their last collective bargaining agreement with the United Mine Workers of America.

This issue is ripe for Summary Judgment. The papers submitted by the parties demonstrate that there is no issue of material fact.

The 1984 wage agreement, which expired January 31, 1988, was the last in a series of collective bargaining agreements between the UMWA and the mining companies. Pursuant to the 1984 and prior wage agreements the mining companies provided health and life insurance benefits for retirees for whom they were the last signatory employer.

[6] The agreement provides, as prior agreements had provided, "That these benefits," and I am quoting from Article 20 of the 1978, 1981 and 1984 agreements, "shall be guaranteed during the term of this agreement by the employer."

In 1986 the mining companies ceased doing business. In 1987 they advised the UMWA and shortly thereafter the Benefit Trust that they had ceased their operations and had no intention of resuming their businesses.

As a result the mining companies did not intend and in fact did not become signatories to any subsequent collective bargaining agreement.

The mining companies advised the UMWA that they believed that upon termination of the 1984 wage agreement they would no longer be obligated to pay these benefits. The UMWA advised them in turn that it believed that someone, either the mining companies or the 1974 Benefit Plan and Trust, was obliged to pay these benefits.

And the UMWA has filed a Proof of Claim in these reorganization proceedings for health and life insurance benefits.

The mining companies also advised the [7] Benefit Plan and Trust that they believed that the Plan and Trust was only to commence the payment of these bene-

fits as of February 1, 1988. The Benefit Trust has refused to do so in this case.

The mining companies contend that the language of the 1984 wage agreement requiring them to provide benefits "during the term of the agreement" means that obligation of the mining companies to pay these benefits expires when the agreement expires.

A number of Courts have previously been presented with this identical issue with respect to the identical language as it appears in the 1978, 1981 and 1984 agreements which we cite in our brief, every case addressed the issue, including primarily the Royal Coal decision issued by the Court of Appeals for the Fourth Circuit in 1985.

These Courts concluded that the language limiting an employer's guarantee of benefits "during the term of the agreement" means exactly what it says, and that the employer's obligation expires upon contract termination.

We urge Your Honor to adopt the straightforward common sense reading of the contract language.

[8] Neither the UMWA nor the Benefit Trust has suggested any other possible interpretation of this language. And indeed the Benefit Trust in its own adjudicative capacity under the plan document where it hears and determines cases brought by retirees against their former employers has repeatedly followed the Royal Coal decision and found that an employer's obligation to provide health and life insurance benefits expires when the contract expires.

The Benefit Trust's objections to this motion are lacking in merit. It claims in its papers that this motion presents no case or controversy and that the Debtors have no standing to seek the relief sought here today.

There is no basis for either objection.

The wage agreement has expired. There is clearly adversity here. The UMWA has filed a Proof of Claim for these benefits.

The Debtors are making payments which they believe they have no legal obligation to pay. The UMWA con-

tinues to assert that someone is liable. The Benefit Trust continues to refuse to make the payments.

While denying adversity the Benefit Trust [9] in its most recent set of papers filed in opposition to this motion, mostly by way of innuendo, because there is clearly no legal basis for doing so has claimed that the mining companies or suggest that the mining companies may have a continuing obligation to pay because they continue to maintain the health plan in place pursuant to which payments are being made.

There is also clearly standing. Since who better than the mining companies has standing to seek an adjudication of their own obligations to make payments pursuant to a contract to which they were signatories?

For all these reasons, Your Honor, the mining companies respectfully request that the motion be granted in its entirety. Thank you.

THE COURT: Does anyone else want to be heard for the motion?

MR. HANRAHAN: Good morning, Judge Lifland.

THE COURT: You are in opposition. I see someone rising.

MS. HILLMAN: Your Honor, my name is Barbara Hillman and I represent the United Mine Workers of America and the 900 retired— [10] approximately 900 retired miners and beneficiaries.

You ask if I rise in support of the motion. Let me indicate I rise in support of the retirees and their surviving spouses.

I rise in support of the collective bargaining obligation which requires that the health benefits presently being received by these miners and their surviving spouses be paid, as the contract says, for life or until death or remarriage of a surviving spouse.

As our papers indicate it is the position of the United Mine Workers on behalf of itself and the retirees that it represents that someone is obliged to provide those guaranteed benefits.

We do not dispute the position taken by the Debtors in this case that there is applicable law which is binding, we believe, upon the trust funds, indeed perhaps upon the union which requires that these benefits be paid by the trust funds.

The Debtors here seek Summary Judgment on the first count of their Complaint. That first count deals with identifying the person, the entity which is obliged to pay.

We do not take issue with the requirement [11] that the trust funds should be obliged to pay.

We are concerned here, however, Your Honor, that the retirees and their surviving spouses not be put even on a temporary basis in the untenable position of not having any insurance benefits without—being without that type of coverage.

It is our position that we do have, despite what the funds seems to say, a live controversy here. We have 900 retirees. We have surviving spouses who have been promised health insurance benefits.

We also have here a live controversy, which, as we have indicated before, Your Honor, we believe the Court should reach and decide on the merits the question of who is obliged to provide the health benefits that the retirees have been promised for life.

The case is—comes before you with decisions already rendered by the Fourth Circuit and other Courts.

Not only do we feel that this is persuasive authority but as we have argued in our brief we think the funds are stopped from arguing that they do not have any responsibility to provide [12] the benefits.

I am not going to go into long argument, Your Honor, or repeat what we have already said to the Court.

We are concerned that the retirees not be cut off. We agree that the authority, which has been presented to the Court, clearly obligates the trust funds, not the employer, not the Debtors here, to provide those benefits. That pursuant to—

THE COURT: But that's a motion for Partial Summary Judgment. That latter request has not been made

part of the relief sought by anyone. I would imagine the other shoe would be, assuming that I grant the motion, your motion or even the Debtors' motion with respect to responsibility to make payments on the part of the trust.

MS. HILLMAN: Your Honor, we, as you know, filed a motion with respect to our cross-claim perhaps to be assured that the matter would come directly before the Court. But as I understand the Debtors' motion in this case, it is for Partial Summary Judgment, but Summary Judgment with respect to count one of their Complaint.

THE COURT: That's correct.

[13] MS. HILLMAN: Count one of the Complaint the Debtors seek a declaratory judgment as to the identity of the entity who is obligated to provide the contractual payments.

As I read, and I don't mean to speak for the Court, but as I read count one of the Complaint the Debtors are asking this Court to determine whether it is the Debtors or the funds who are responsible for making those payments.

The Debtors here seek Partial Summary Judgment with respect to that full first count of their Complaint and they cite to the Court the decision in Royal, which is a decision saying not only in that case that the employer had no obligation to provide the benefits, but that the benefits were lifetime guaranteed benefits and the funds did have an obligation to provide.

We would suggest, Your Honor, that this is not outside the motion which is before the Court.

THE COURT: I don't know that a Court on the motion for Summary Judgment can't search the record. But that's beside the point.

MS. HILLMAN: It's not a question of searching the record, Your Honor. I think the [14] Debtors here are seeking Summary Judgment on count one of their Complaint.

Count one of their Complaint asking for ruling from this Court that the trust fund is obliged to provide those benefits. I don't think we are outside the motion.

I think that the Court has to reach the full issue, otherwise we are dealing here with 900 miners, their survivors who are not going to have any benefits.

The Debtors bring before the Court as part of count one a collective bargaining agreement which requires payments for life.

They cite to the Court in the decisions in Royal, which clearly indicates that the benefits, the retirees benefits are lifetime guaranteed benefits, that there is an obligation by someone to provide those benefits.

They seek Summary Judgment on count one. Count one seeks a declaration that the funds, not the Debtor, are obligated to make those payments. And we are suggesting here that it would cause irreparable harm if the Court did not determine with respect to the Motion for Summary Judgment all of what is [15] contained in count one but only grant a portion of what the Debtors seeks with respect to count one.

The Debtors, as I read count one of the Complaint, seeks two things: One, a determination that it is not obligated to make the payments, but, two, that the trust fund is so obliged.

And we want to assure that the Court reach the full allegations of that count when it makes its ruling on this Motion for Summary Judgment, otherwise we are dealing here with individuals who have really no other recourse, persons on limited income who are going to be cut off for health care if the Court would determine only a portion of the Motion for Summary Judgment without reaching the full issues raised by count one of Debtors' Complaint.

We think there is no reason for the Court not to reach the full issues. We don't think there is any basis for arguing that someone is not obliged to make the payments.

The collective bargaining agreements, which the Debtors have attached to their motion, indicate, and I think in nine places, that the benefits here at issue are lifetime benefits guaranted for life or for spouses until

death or [16] remarriage, and believe that the controlling law obligates the funds to provide those benefits if Debtors do not have to

We are here to ask that the Court insure that the benefits are paid. We agree with Debtors that under the controlling law, which we believe the funds are collaterally estopped from disputing, that the Debtors are not obliged but that the funds have to provide the benefits.

MR. HANRAHAN: Good morning, Judge Lifland. William Hanrahan representing the 1974 Benefit Trust and its Trustees.

As we read the Debtors' motion for Partial Summary Judgment, the only issue before this Court this morning is as framed in the Debtors' memorandum in support of their motion the question of whether the coal companies have a continuing obligation to provide benefits to the retirees.

I think it's clear from the Debtors' papers that they are not seeking any relief at this time with respect to the other issue framed in count one of their Complaint.

And certainly there is nothing in their memorandum that would suggest that they are seeking [17] an adjudication of the '74 Benefit Plan's liabilities right now.

What is clear from the pleadings before you, from the Complaint, from the Answer and from the memorandum submitted by the UmWA is that between the parties sitting at the table next to me there is no dispute about the coal companies' obligation to provide benefits under the expired coal wage agreement.

Under those circumstances I would suggest to you that it is eminently clear that there is no case or controversy between those parties, the coal companies on the one hand and the purported representatives of the retirees on the other.

As such, it is well-established under Article 3 of the Constitution that there is nothing for this Court to adjudicate on this Motion for Partial Summary Judgment.

Nearly 140 years ago in Lord versus Vesey the Supreme Court said that when two friendly parties get together to have a lawsuit to affect the rights of others, that the Court will not hear it because there is no issue presented in an appropriate adversary context. That's the situation here.

[18] Very much like Moore versus Charlotte Mecklenborg, The Board of Education where the Supreme Court said, "When parties seek precisely the same relief the appeal will be dismissed." That's what this Court should do.

Of course, both parties point to the 1974 Benefit Plan and say that ultimately the plan is the responsible party for the retirees' benefits. That issue is not before the Court this morning. And with respect to the issue that is, the Plan is a stranger to the purported dispute between LTV's companies and the union. The Plan's provisions are fairly clear and fairly limited.

The Trustees must determine whether retirees would otherwise cease to receive health benefits because their last signatory employer is no longer in business, a defined term.

The Plan's obligation does not turn on whether the employer has or does not have a present obligation to provide benefits.

Indeed, in many hundreds of cases the Plan has gone forward and provide benefits even during the life of the collective bargaining agreement where there is a clear obligation because the employer [19] satisfies the conditions set forth under the plan.

Thus there is no dispute of a legally cognizable kind between the Plan and the companies with respect to the companies' obligations under the expired agreement.

You might wonder why this motion is on before you this morning. And I think to explain that requires some examination of the legislation Congress passed one week before this adversary proceeding was filed, the Bankruptcy Protection Act of 1988.

It is clear that Congress said to these companies, with these companies in mind, that they must do what Congress had commanded them to do in October 1986, which is to pay the health benefits, until there is a modification either by agreement with a proper representative of the retirees or an Order of the Court.

Given that legislation the question of—the hypothetical question of whatever effect the expired agreement might have is irrelevant to the question of the companies' obligation to pay benefits.

It is somewhat curious that neither of these parties have addressed the substantive impact [20] of that legislation on this motion that would have you give a judicial blessing to the proclamation that the companies have no obligation.

They seek to avoid the procedures set forth under the Act for resolving that question and they seek at the same time to create a situation where a potential dispute that might some day arise betwen the retirees and the '74 Benefit Plan would arise under ERISA and be brought in the appropriate forum is somehow transformed into a hypothetical dispute that can be heard by this Court.

I suggest to you that on the pleadings before you it's apparent that this is nothing more than an effort to confer jurisdiction on the Court over an issue which no one is disputing.

Let me add one further word about the case law that these parties rely on.

As you indicated last Wednesday, and you are quite familiar with the Fourth Circuit jurisprudence on these issues, I think you should keep in mind what the Fourth Circuit did on an expedited appeal from a Preliminary Injunction and what it said in Royal I and what it said about it later in Royal II.

[21] In Royal II the Court was troubled by its first decision when it looked at the terms of the '74 Benefit Plan; it said there was a patent limitation on the obligation to provide benefits, which was not satisfied on the facts before it.

It then cast its mind back to the Royal I decision and said, the reason the parties wrote what they wrote in the '74 Benefit Plan is that they could not have anticipated or did not anticipate our decision in Royal I.

I suggest to you that this comes as close as you are likely to see to a confession of error with respect to the Royal I case from the Fourth Circuit and from the author of both opinions in Royal I and Royal II.

If you were to find that there was something before you to adjudicate on this motion, and there is not, then I suggest that you look carefully before you follow the cases as these parties would have you do. Thank you.

MS. KATZ: Your Honor, just two statements.

One, with respect to the Retirees' Benefits Bankruptcy Protection Act. We would just [22] indicate that statute was not passed to benefit the Benefit Trust and nothing in that statute requires a Debtor to pay monies that it would not be required to pay had it never filed a petition for reorganization. It does not impose upon a Debtor obligations that it would not have incurred otherwise.

Secondly, we believe that Royal Coal, regardless of Mr. Hanrahan's suggestion, is good law. It has been followed since the Fourth Circuit decided it and there is no reason to believe that it is not good law. Thank you.

THE COURT: What about the issue with respect to the reach of the Motion for Partial Summary Judgment; that is the full measure of count one of the Complaint, which seeks a declaration as to who is responsible to make the payments?

MS. KATZ: Your Honor, we think that—we hope that the full measure of count one will be determined very shortly. The union has filed a Motion for Summary Judgment on its cross-claim—

THE COURT: I am not aware of that.

MS. KATZ: It was filed on Friday. We were served with the papers on Friday. So we believe that that will be heard—we hope it will be heard [23] shortly.

The issue that we put before the Court today we believe can be parsed out, that is the Royal Coal I decision. If there is an obligation to pay beyond—

THE COURT: So you don't agree with your colleague at the table that your motion reaches the declaration of who is responsible to pay; that is the subject, then, of the union's Motion for Summary Judgment?

MS. KATZ: We think it could encompass it. It has been briefed in response to our motion.

THE COURT: But it's not really been briefed as between you and the Trust.

MS. KATZ: Not fully. I gather the Trust has said in its papers that—

THE COURT: I don't know really that it has to. Yes, the—

MS. KATZ: I don't know that it would have responded any differently. They certainly haven't done anything differently here today in the argument.

THE COURT: Does anybody else want to be heard?

MS. HILLMAN: Let me just indicate, Your [24] Honor, we think, as we said before, that it is for the Court to determine a portion of the count one without determining the full—

THE COURT: But you placed before the Court the rest of count one.

MS. HILLMAN: Perhaps in an abundance of overcaution, Your Honor, we filed another motion with respect to our cross-claim. However, Your Honor, we are dealing here—

THE COURT: It's only a question of timing. I was frankly surprised that you hadn't joined in the Motion for Summary Judgment logically for the full measure of count one. But now you indicate by a separate motion you have already done that.

MS. HILLMAN: Well, Your Honor, we have. There is no question about that. We would suggest, however, that, one, probably it wasn't necessary.

But, two, even if it were for the Court in the interim, no matter how brief an interim, we are talking about to deprive the retirees here—

THE COURT: When is your motion returnable?

MS. HILLMAN: We have not set a date [25] pending your decision today. It obviously was filed, I believe, last Thursday or Friday. We are prepared and we believe the matter has been argued and been briefed. Certainly the papers before you deal with that issue.

But certainly it would suggest even if we are talking about a brief interim, a short period of time, we are talking about people's health care.

We are not talking about some, perhaps, speculative harm. We are talking about actual real direct fast time.

We would suggest it would be inappropriate on that basis alone for this Court either not to reach the full issues before the Court on count one of Debtors claim or, two, to reach that decision prior to such time as the Court deals with either our cross-claim or the full measure of relief sought with respect to count one.

MR. HANRAHAN: I think the degree of cooperation between these parties is evident from the efforts to mislead the '74 Plan as to what issue is before the Court this morning.

I suggest to you there is no doubt from the companies' papers that they sought only a [26] declaration of their own liability.

The Plan, therefore, had not addressed an issue not present in that motion, the question of the '74 Plan's liability to the retirees. On Friday we received—

THE COURT: Do you agree or disagree with the concept that if the Debtors are not responsible then the Trust is?

MR. HANRAHAN: Yes, we do.

THE COURT: You disagree?

MR. HANRAHAN: Yes, quite clearly. We have not reached or briefed that issue because it's not before the Court this morning.

To the extent the union seeks to raise it in their motion served on us on Friday, with no return date, I think we should have at least the opportunity to address those issues if the Court wishes to reach them.

THE COURT: No. Mr. Hanrahan, it is clear based upon the case law and the papers before me that whether or not the Debtors asked me to take that extra step in their Motion for Partial Summary Judgment the issues have been fully laid out and I would only ask you whether or not you would agree to [27] waive your right to respond to the union and let me make the determination today.

I do not see, frankly, that there is very much more that ought be brought before the Court to make a determination on the law at least, as to who is responsible to make payment.

I do not see that there is any further issue of fact as between the Trust and the union.

MR. HANRAHAN: I cannot agree to waive our opportunity to respond to a twenty-five page brief on collateral estoppel, which is the, as far as I can see, sole basis for the union's cross-motion. We have not addressed that and we didn't address it in the companies' papers because it wasn't there.

THE COURT: What is disturbing about that is the perhaps glib allusion to cooperation between the Debtors and the union and total disregard of the concerns that both sides express with respect or the degree of parochial interest, I suppose, with respect to the beneficiaries, to wit: the 800 employees. It seems to me the Trust is taking a rather cool, if not cold position there.

MR. HANRAHAN: Your Honor, I wouldn't say, as I said last Wednesday, the Trust is responsible [28] for paying benefits to approximately 6,000 people. They have concerns about those people, as they properly should. We have pending before you a Motion to Dismiss this entire action, which is set for a hearing on August 18th.

I think that it would be appropriate for you to hear that motion before at least reaching any decision on whatever motion is before you today. You heard my explanation of what I think is before you today. Therefore, I suggest to you that nothing untoward will happen until you had an opportunity to hear the Motion to Dismiss.

THE COURT: Does anyone else want to be heard?

(No response.)

THE COURT: The motion has been in my view focused by the Debtors and responded to by the Defendant on the issue as to the obligation of the Debtors to make payment absent any waiver; I do not see that I ought go beyond the request for relief today.

So that the issue now is whether the Debtors' mining companies, BCWR, Nemacolin and Tuscaloosa are obliged to provide health and life [29] insurance benefits to their retirees subsequent to the expiration of the mining companies' collective bargaining agreements with the United Mine Workers of America, representatives of the retirees.

LTV Steel Corp. and the mining companies commenced the instant adversary proceeding against the Benefit Trust and the United Mine Workers of America.

The Plaintiffs seek declaratory judgment concerning the rights and obligations of the parties with respect to the payment of retiree health benefits on behalf of certain UMWA represented retirees.

LTV obtains authorization to pay retiree benefits pending resolution of this matter. Subsequently, the Plaintiffs moved for Partial Summary Judgment with respect to their obligation to pay benefits upon the expiration of their collective bargaining agreements with the union.

The mining companies are three wholly owned subsidiaries of LTV Steel Company. They are no longer in business and have no intention of resuming business. They filed petition for reorganization on July 17, 1986 and are presently Debtors in Possession [30] before this Court.

The mining companies were signatories to the 1974, '78, '81 and '84 industry-wide wage agreements negotiated between the union and the Bituminous Coal Operators Association.

The 1984 wage agreement, which was the last collective bargaining agreement to which the mining companies were signatories, expired on January 31, 1988.

The 1974 wage agreement established the 1974 Benefit Plan and Trust. The Benefit Trust was to be funded by employer contributions. See the 1974 wage agreement attached as Exhibit 1 to the Affidavit of George T. Henning, Article 20, Sections (a) and (c).

Pursuant to the 1978 wage agreement and continuing through the 1981 and '84 wage agreements employers were obligated to provide for health and life insurance benefits to both active and retired workers. See the 1978 wage agreement, Henning Affidavit, Exhibit 3, Article 20, Section (c) (3) (i). The mining companies, which are the last signatory employer for the retirees, claim that they have no legal obligation beyond the term of the last wage [31] agreement to which they were signatories to pay benefits to the retirees.

Plaintiffs move pursuant to Rule 56 of the Federal Rules of Civil Procedure as incorporated by 7056 of the Federal Rules of Bankruptcy Procedure for Partial Summary Judgment on the first Cause of Action in their Complaint.

They allege that the mining companies' obligation to pay health and life insurance benefits on behalf of the retirees terminated on January 31, 1988, the expiration date of the collective bargaining wage agreements with the union.

Defendant, the Benefit Trust, do not respond to the merits of the issue raised and instead circumvent the mining companies' legal arguments by alleging the absence of a controversy and a lack of standing on the part of the Plaintiffs.

As a preliminary matter this Court notes that this adversary proceeding is a core proceeding pursuant to, inter alia, 28 U.S.C. 157 (b) (2) (A) and (O).

Rule 13(h) of the Local Rules of Bankruptcy Procedure for the Southern District of New York states in relevant part, and I quote:

[32] "The papers opposing the Motion for Summary Judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

"All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

This Court notes that the Benefit Trust has not controverted the movants' assertion of the material facts and those facts are therefore deemed admitted.

Thus, inter alia, the provisions and termination date of the wage agreement are not in controversy. Nor is the Debtors' assertion that they are "no longer in business."

"Summary Judgment is appropriate where the moving party demonstrates the lack of any genuine issue of material fact to be tried." In re O.P.M. Leasing Services, Inc., 46 BR 661, 665, Bankruptcy Court Southern District of New York, 1985.

Thus "only disputes over facts that might [33] affect the outcome of the suit under the governing law will properly preclude the entry of Summary Judgment." Anderson against Liberty Lobby, Inc., 106 Supreme Court 2505, 1986.

All ambiguities must be resolved and all reasonable inferences must be drawn in favor of the party against whom Summary Judgment is sought. U.S. Fire Insurance Co., 804 F.2d 9, 10 through 11 Second Circuit, 1986, cert. denied, 107 Supreme Court 1570, 1987; see also Schiess-Froriep Corp. against S.S. Finnsailor, 574 F. 2d 123, 126 Second Circuit, 1978.

The mining companies cite very persuasive authorities, directly on point, in support of their position.

First, the mining companies correctly note that the obligations created by a collective bargaining agreement are determined by the terms of the contract and the intentions of the parties. District 29, United Mine Workers of An ica against Royal Coal Company, 768 F. 2d 588, 590, r ourth Circuit, 1985 cert. denied 108 Supreme Court, 1111 known as Royal Court I; also Box against Coalite, Inc., 643 Fed Supp. 709, 711 Northern District of Alabama, 1986.

[34] In Royal Coal I Royal Coal ceased mining operations prior to the expiration of the 1981 wage agreement which expired on October 1, 1984. Royal ceased providing health and life insurance benefit to its retirees on the expiration date.

The 1974 Benefit Trust refused to assume those benefit obligations claiming that Royal had sufficient assets to pay those benefits and therefore that it did not qualify as being "no longer in business" within the meaning of the 1978 and 1981 wage agreement. See article XX(c)(3)(ii) of the 1984 collective bargaining agreement.

The Court, however, did not view this provision as relevant to the issue. Instead, the Court in Royal Coal I held that "Royal's obligation to provide health benefits and life insurance coverage to its retired and disabled coal miners under the 1978 and 1981 wage agreements ceased upon the expiration of those agreements." Royal Coal I, 768, F. 2d at 589.

In reaching this holding the Court relied upon Article XX, Section (c)(3)(i) of the 1978 wage agreement which states in relevant part:

"Each signatory employer shall establish [35] an employee benefit plan to provide, implemented, through an insurance carrier, health and other nonpension benefits for its employees covered by this agreement as well as pensioners under the 1974 Pension Plan and Trust, whose last classified employment was with such employer. The

benefits provided pursuant to such plans shall be guaranteed," and I underscore, "during the term of this agreement by each employer at levels set forth in such plans."

Article XX of the instant 1984 wage agreement is almost identical to the relevant material portions of Article XX of the 1978 wage agreement. That agreement states in relevant part:

"The benefits provided by the employer to its eligible participants pursuant to such plans shall be guaranteed," and I emphasize, "during the term of this agreement by that employer at levels set forth in such plans." See the Henning Affidavit, Exhibit 4, see id., Section (d), the health benefits "are guaranteed during the term of this agreement"; id. Section (10) health care.

The Court in J.C. Box Coalite, Inc., concurred with the Fourth Circuit interpretation of Article XX, Section (d) (3) (i) of the 1981 agreement, [36] holding that the wage agreement limits the employer's duty to pay health and other nonpension benefits to the term of the governing agreement. J.C. Box Coalite, Inc., 643 Fed Supp. 709, 712, North District Alabama, 1986.

The Court of Appeals in District 29, United Mine Workers of America against Royal Coal Company, 826 F. 2d 280, the Fourth Circuit, cert. denied 108 Supreme Court 1111, known euphemistically as Royal II, dealt with a slightly different issue.

The question presented in that case was where the former employer remains in business, and I quote "in business," as defined in the wage agreement but is not legally liable since the governing wage agreement terminated, is the 1974 Benefit Trust obligated to assume this responsibility?

The Fourth Circuit found that health benefits are guaranteed for life. Nonetheless, despite this provision, the Court held that, "It is clear that neither the former employer nor its corporate successor is legally liable for providing these health benefits. To construe the contract to create no liability on the part of the 1974 Benefit Plan

would have the effect of defeating the expressed [37] intention to provide lifetime benefits." District 29 UMWA against Royal Coal 826 F. 2d at 283.

The Benefit Trust does not cite any countervailing authority. Instead, it raises the following two arguments:

First, that there is no case or controversy, and second that the mining companies lack standing to litigate the instant proceeding.

The Supreme Court has defined a case or controversy as follows:

"Basically the question in each case is whether the facts alleged under all the circumstances show that there is a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality . . ."

Maryland Casualty Co. against Pacific Coal & Oil Co., 312 U.S. 270, 273, 1941. According to the Supreme Court, a present right must be at stake, there must be a dispute which does not call for an advisory or hypothetical opinion "but for an adjudication of a present right upon established facts."

Ashcroft, Attorney General of Missouri against Matts, 431, U.S. 171, 172, rehearing denied, [38] 433 U.S. 915, citing Aetna Life against Haworth, 300 U.S. 227, 242. 1937.

The Benefit Trust claims that since it has no authority to enforce the rights of the retirees against the mining companies they have no adverse legal interest to the mining companies.

The issue, however, is not the enforcement of the retirees' rights against the mining companies. The instant motion seeks to establish the obligation pursuant to the wage agreement of the mining companies subsequent to the expiration of the 1984 agreement, and the Complaint further seeks a determination as to whether these post-expiration obligations are now the responsibility of the Benefit Trust.

According to Royal I and Royal II, the rights and obligations of the parties are governed by the wage agreements.

The issue of liability for payment of the retirees' health and life insurance benefits subsequent to the determination of the 1984 wage agreement is an actual controversy between the mining companies and the Benefit Trust. In Royal II the Fourth Circuit after adjudicating this very issue, [39] held that the Benefit Trust was obligated to pay the retirees' health and life insurance benefits subsequent to the expiration of the employer's contractual obligations pursuant to the 1978 and 1981 wage agreement. Those agreements are identical to the 1984 wage agreements in all material respects.

The Benefit Trust's second argument, that the mining companies have no standing because they have no stake in the outcome, is also unpersuasive. I might add, highly unpersuasive.

A party asserting a claim must have a real and "personal stake in the outcome of the controversy" to invoke a Court's jurisdiction on his behalf. See Sierra Club against Morton, 405 U.S. 727, 731 through 32, 1972.

This Court has previously recognized In re Johns-Manville Corp., 68 BR 618, that courts will generally only hear arguments of parties who have a direct stake in the consequences of a proceeding.

As this Court noted in that opinion, "a person who seeks to appeal an Order of the Bankruptcy Court must be directly and adversely affected pecuniarily."

Although the case discusses the question [40] of standing on appeal, it is nevertheless instructive with respect to the present issue.

The mining companies most definitely have a stake in the outcome of this proceeding. If the mining companies are found not to be liable for the payments to the retirees then the mining companies, LTV Steel and its creditors are and will be injured by both the interim and any potential future payment of the benefits.

Indeed, should the Court rule in the mining companies' favor, they would then not be responsible to the retirees for any further obligations under the 1984 agreement. This would clearly amount to a cognizable stake sufficient to vest the mining companies with standing in the instant proceeding.

Based upon the preceding analysis, this Court concludes. The last collective bargaining agreement to which the mining companies were signatories, the 1984 wage agreement, expired on January 31, 1988.

The obligations and responsibilities of the mining companies toward their retirees ceased when the wage agreement expired pursuant to the [41] provisions of the agreement.

Accordingly, the mining companies are entitled to Partial Summary Judgment in their favor as a matter of law.

Now, with respect to the request by the United Mine Workers that I grant the balance of count one of the Complaint and fix the obligation of the Trust, it would be appropriate under the Court's ruling and discussion of the law, however mindful of due process and the fact that the moving papers did more narrowly prescribe the relief requested on behalf of the mining companies, it absent any waiver on the part of Mr. Hanrahan, is not within this Court's desire to somewhat overreach, although I think my ruling covers the territory most completely.

And with Rule 11 in mind, Mr. Hanrahan, unless there are some very, very persuasive arguments that you have not, or in reserve, that you have not brought forth today, it would seem to me that rather than jeopardize and leave the retirees exposed to the prospect of having to wait for another shoe to drop, to wit: my hearing the union's Motion for Summary Judgment on the issue that you might reconsider.

But I am not prepared at this point to go [42] beyond the specific request for relief that I parsed out from the

papers, and that is a declaration as to the obligation of the Debtors for the purpose of this morning's hearing.

MS. HILLMAN: I don't know if Mr. Hanrahan wishes to respond, Your Honor, but on behalf of the union retirees and in light of your ruling we would ask this Court to orally set forth an Order to Show Cause returnable as soon as possible—

THE COURT: Have you served your motion?

MS. HILLMAN: Yes, we have. It was served on all parties by—

THE COURT: Certainly, it ought to be returnable before August 18th or by August 18th.

MS. HILLMAN: We would ask it be returnable no later than the 8th of August, which is ten days' notice, which is appropriate under the rules, and we would ask that the Court orally order returnable on that date.

Further we would ask that the Court stay its decision with respect to the mining companies until August 8th at the time of the hearing on our motion—

THE COURT: As a practical matter, aren't [43] these payments due and payable at the end or the beginning of the following month?

MS. HILLMAN: The way I understand it, the system operates, Your Honor, is that the employees' health claims will no longer be honored. The Debtors indicate they have no objection to the Court staying its Order with respect to their obligation to August 8th, when it would appropriately set the United Mine Workers' Motion for Summary Judgment on their cross-claim. They would continue to pay the benefits until that time, until the Court makes its ruling on the union's cross-claim.

MS. KATZ: The only—

THE COURT: You made a broad statement and I think it was addressed first to Mr. Hanrahan as to whether or not he is going to sustain or continue the position that he has taken previously.

MR. HANRAHAN: Your Honor, I would certainly appreciate the opportunity to make the arguments for the '74 Benefit Plan and to make a record on their position—

THE COURT: The case law, the authority is so persuasive as to the obligations on the Trust, Mr. Hanrahan—

[44] MR. HANRAHAN: I suggest you have not heard our argument. So I need to make those arguments.

THE COURT: I yield to your concerns, Mr. Hanrahan.

MR. SPEISER: The Committee now rises in connection with this litigation. An Order was entered authorizing the Debtors to make payments to the retirees until it was determined whether or not they were liable, and the Committee did not object to that relief. I think based on the record this morning, Your Honor's decision, it's more appropriate that if Your Honor is not ready to give final relief against—

THE COURT: Oh, indeed, I would unless I heard something that is highly persuasive. More than highly persuasive, it's got to be something that is almost damning to this morning's ruling.

MR. SPEISER: Then we would respond that it's more appropriate you grant preliminary relief against the Trust that they make the payments.

It just seems inequitable now it's been determined that the companies have—

THE COURT: You are asking me then to [45] grant Summary Judgment in favor of the union, which is something I would be prepared to do based upon this morning's ruling, except that I think, as I stated before, due process indicates that Mr. Hanrahan should have an opportunity to respond to the union's motion.

MR. SPEISER: This would be on a preliminary basis and they certainly have notice. It would not be the first time a party has been directed on a preliminary basis to make payments.

The matter had been briefed. They are familiar with it. Your Honor has ruled. He has an opportunity now

to explain to Your Honor why on preliminary basis until there can be an expedited hearing on the union's motion for Summary Judgment they should not have the burden of making the payments. We just think at this time it is inequitable to have the Debtors make these payments.

MS. KATZ: Alternatively, Your Honor, since Miss Hillman has made an application orally for an Order to Show Cause we would suggest that Your Honor could make it returnable this week, it would just then be a matter of days and we think the matter could be disposed of at that time.

[46] MR. HANRAHAN: You have expressed concern about due process—

THE COURT: No, I haven't expressed any concern about due process, Mr. Hanrahan. I was recognizing that any adversary should be given a full and fair opportunity to respond. And you have just been served with the Mine Workers' Motion for Summary Judgment.

MR. HANRAHAN: With no return date I would suggest to you that you take that matter up at the hearing on our Motion to Dismiss this entire case on August 18th and deal with it then.

THE COURT: Under the circumstances of my ruling I think that an unacceptable tension to be placed here. I am going to make it returnable on the week of the 15th, or indeed I can accommodate you by this Thursday, August 4th.

MS. HILLMAN: That would be agreeable to us, Your Honor, and the document was served on all parties and I think everyone received it on Friday morning.

MR. SPEISER: Your Honor, again I rise to suggest that the August 4th is the appropriate date if it's considered that LTV would continue to make [47] payments. We don't care when the hearing is if LTV is not going to continue to make payments after a determination that it is no longer liable to make those payments.

THE COURT: I think it is intolerable to leave these retirees in a squeeze.

MR. SPEISER: So do we.

THE COURT: Mr. Hanrahan, you have indicated and shown a wonderful ability to marshal your firm's talents with respect to briefing.

As a matter of fact, when I gave you time for a brief last week I think you handed it up to me at the very moment I gave you some extra time to respond by way of brief.

But I think you are fully familiar with all of the issues here and it shouldn't create a great burden. Actually, everything that is the subject of the Mine Workers' Motion for Summary Judgment is really the subject and dealt with pursuant to all of count one.

MR. HANRAHAN: I can only say I am completely surprised by what appears to have been on the Court's mind this morning far beyond what—

THE COURT: I don't know what you mean by [48] that. If you mean it's on the Court's mind to render a determination based upon a record that's full and complete, beyond that I do find persuasive many of the arguments that all of count one has been dealt with. But I did review your papers very carefully and I did note you responded in limited fashion to the request for relief by the Debtors.

I also am surprised, as you are, perhaps, by the Court's position this morning, I am surprised that I wasn't asked by anybody this morning to deal with the full issue of count one, except orally by the union.

All right, August 4th at 2:00 o'clock with respect to the Mine Workers' motion.

MS. HILLMAN: Thank you, Your Honor.

MS. KATZ: Your Honor, could I just add one further thing for the record?

To the extent that the Debtors continue to make payments in this interim period there is language in the Order authorizing those payments which retains the Debtors' rights against the Mine Workers with respect to

Plan of Reorganization and we are assuming, I hope correctly, that those same provisions would continue to apply. [49] THE COURT: Yes, they will apply. It is so ordered. And I will so order this ruling but I also request that you submit an Order.

MS. KATZ: Thank you, Your Honor. We shall.

[50] CERTIFICATE

I, ROBERT PAYENSON, a Shorthand Reporter and Notary Public of the State of New York, do hereby certify:

That I reported the proceedings hereinbefore set forth and that the foregoing is a true record of the proceedings herein.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

/s/ Robert Payenson

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CHATEAUGAY CORPORATION,
REOMAR, INC., THE LTV CORPORATION, *et al.*,
Debtors.

LTV STEEL COMPANY, INC., BCNR MINING CORPORATION, NEMACOLIN MINES CORPORATION, and TUSCALOOSA ENERGY CORPORATION,
Plaintiffs,

v.

JOSEPH P. CONNORS, SR., DONALD E. PIERCE, JR., WILLIAM MILLER, WILLIAM B. JORDAN and PAUL R. DEAN, as Trustees of the UNITED MINE WORKERS OF AMERICA 1974 BENEFITS PLAN AND TRUST, the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST, and the UNITED MINE WORKERS OF AMERICA,
Defendants.

In Proceedings For a Reorganization Under
Chapter 11.
Case Nos. 86 B 11270 (BRC) Through
86 B 11334 (BRL) Inclusive, 86 B 11402 (BRL)
and 86 B 11464 (BRL)

Ad. Pro. No. 88-5502A

ORDER GRANTING MOTION FOR
PARTIAL SUMMARY JUDGMENT

Upon the notice of motion dated July 18, 1988 (the "Motion") of BCNR Mining Corporation, Nemacolin Mines Corporation, and Tuscaloosa Energy Corporation,

debtors and debtors-in-possession herein (the "Mining Companies"), for an order declaring that the Mining Companies' obligation to pay health and life insurance benefits pursuant to the National Bituminous Coal Wage Agreement of 1984 (the "1984 Wage Agreement") expired on January 31, 1988, for approximately eight hundred and sixty five retirees represented by the United Mine Workers of America ("UMWA"), and upon the Affidavit of George T. Henning dated July 14, 1988, the Statement pursuant to Rule 13(h) of the Local Bankruptcy Rules of this Court and the Memorandum of Law in support thereof; and responsive papers having been filed; and the Motion having been scheduled for a hearing and the hearing having been held before this Court on August 1, 1988; and this Court having issued from the Bench an oral opinion granting the Motion in its entirety; and a cross-claim and a motion for summary judgment on the cross-claim having been filed by the UMWA; and an oral application for an order to show cause ("Order to Show Cause") having been made by the UMWA with respect to its motion for summary judgment on its cross-claim; and this Court having set August 4, 1988 as the return date with respect to the Order to Show Cause; and after due deliberation and sufficient cause appearing therefor,

NOW, on motion of DAVIS POLK AND WARDWELL and LEVIN & WEINTRAUB & CRAMES, co-counsel for the Mining Companies, it is hereby

DECLARED, ADJUDGED, and DECREED, that upon the expiration of the 1984 Wage Agreement on January 31, 1988, the obligations of the Mining Companies to provide health and life insurance benefits to certain UMWA-represented retirees terminated and since February 1, 1988 the Mining Companies have had no legal obligation to provide such benefits; and it is further

ORDERED, that a hearing on the UMWA's motion for summary judgment on its cross-claim shall be held on August 4, 1988 at 2:00 p.m.; and it is further

ORDERED, that pending resolution of the UMWA's motion for summary judgment on its cross-claim, LTV Steel is authorized to continue to pay health and life insurance benefits to the retirees pursuant to the terms and conditions set forth in the Order Authorizing Payment of Health Benefits and Life Insurance for Certain Retirees, dated July 8, 1988.

Dated: New York, New York
August 3, 1988

/s/ Burton R. Lifland
Chief
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 86 B 11270
(88-5502)

IN THE MATTER OF CHATEAUGAY, *et al.*,
Debtors.

(v. Jos. P. Connors, et al)
Adj. S/C;
Mtn for S/J on cross-claim.

August 4, 1988
United States Custom House
One Bowling Green
New York, New York 10004

Before: HON. BURTON R. LIFLAND, Bankruptcy Judge

[2]

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-and-

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[3]

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PROCEEDINGS

MS. HILLMAN: Good afternoon, Your Honor. We are here this afternoon after having appeared this morning before Judge Stanton on the 1974 Fund's motion for a stay. Obviously, our presence here indicates that the Court denied that stay.

I stand before you representing the United Mine Workers of America and the approximately 900 retirees and surviving spouses of those retirees.

We are here on our Motion for Summary [5] Judgment on our counterclaim seeking to enforce the con-

tractual commitment which has been contained in each and every collective bargaining agreement signed between this Debtor and the mine workers, which every agreement states that every retiree, and I am quoting, "is entitled to receive health benefits until death and his widow until her death or remarriage."

The issue before the Court is one of contract construction. And upon the basis of the language I just quoted we do not believe it is a very difficult contract to construe.

This Court has already held and held on Monday that LTV and its mining subsidiaries have no obligation under the terms of that collective bargaining agreement to continue to provide the benefits.

The fact that the employer does not have such an obligation, however, does not mean that that contractual promise, which I just quoted, has no continuing validity.

The contract itself set up a special fund, the 1974 Benefit Fund, the Defendant before you today, and provides that that Fund is to care for the [6] retirees, that Fund is to provide the benefits for those retirees where the retirees' last employer no longer has an obligation to pay. And the Fund is obliged to make good on that contractual commitment which has been made to each and every mine worker retiree.

As I said, we are dealing here with contract construction, a contract not difficult to construe and indeed a contract which has been authoritatively construed by the Fourth Circuit and at least two other District Courts in West Virginia.

The collective bargaining agreement, the last bargaining agreement in effect between the employer here and the union, 1984 NBCWA, as we call it, is identical in all material respects to the 1981 agreement at issue in the Royal cases previously cited in the Court and is in fact identical to the new 1988 agreement negotiated by the parties after the decision in Royal II was finalized by the Fourth Circuit.

The Fund argues for a different construction than the construction given that contract by the Fourth Circuit in Royal based upon some purported negotiating history during the 1984 [7] negotiations, negotiations which occurred before there was any construction by any Court of the words contained in the 1981 contract, continued in the 1984 contract and remained in the 1988 contract.

The fact that the union was seeking some insurance before it had a construction does not mean that the construction afforded those words by the Fourth Circuit in Royal is not a valid construction, particularly when one is aware that the 1988 agreement negotiated after the Royal decisions contained the same language.

We have had the same material language in the contract since 1978. As we said, we don't think this is a difficult question, even if the question was one of first impression before this Court. As we have indicated it's not one of first impression.

This Court—this contract has been construed consistently, each and every case, retirees are entitled to health benefits for life. Either the employer is obliged to pay or the Fund is obliged to pay. And where the employer no longer has an obligation to pay the Fund is so obliged.

Each and every case has held that. The Allied case, which the Fund seems to assert is [8] contrary is not. In that case the Court held the employer continued to have the obligation. And indeed in this very situation the Debtor here has some employees, some retirees, for whom it has continued to pay and realizing it continues to pay in the future based upon that Allied decision.

In Allied the Fund had no obligation to pay because the employer continued to have the obligation to pay for its failure to secure a successorship agreement.

Similarly in Scarborough, in that case the Court held there was a continuing effective collective bargaining agreement, the employer was continuing to operate and employ persons under that agreement and therefore the employer continued to have an obligation to pay.

Now, I am not denying the retirees may not have been put in an unfortunate position in Scarborough because the employer in that case was in bankruptcy, because that's obviously what the newly enacted Section 1114 of the Code was meant to deal with.

In Scarborough, as in Allied and as in the Royal decisions the employees, the retirees are [9] entitled to lifetime benefits; either the employer pays or the Fund pays.

As we argued in our brief, we feel it's a clear matter of contract construction based on clear precedent; and indeed we believe that this Court is required under the doctrine of collateral estoppel to deny the Fund the opportunity to challenge their obligation which has been so conclusively decided.

The leading cases, I am sure Your Honor is aware, is the Supreme Court's affirmation of the Second Circuit's decision in Parkland Hosiery. We believe each and every element as set forth in Parklane Hosiery with respect to the utilization of collateral estoppel in an affirmative sense has been met here. We have the same issue.

We have the same collective bargaining contract language, we have no change in the language, no change in that which was previously conclusively finally litigated in the Royal decisions.

Obviously, the language or we believe obviously the language quoted by the Fund in their recently submitted papers indicating that there was some change, and they quote the change of the plan document in 1984, is not, we believe, material to [10] this issue.

Obviously, that change dealt with what I am calling at least for today the Scarborough situation. The decision where the employer continued to have an obligation to pay under the collective bargaining contract, but the employer was in financial distress, couldn't pay. A situation which has now been rendered in effect irrelevant because of Section 1114.

Otherwise we have no changes. The contract is identical in all material respects.

We have here the same entity which litigated, and vigorously litigated the issues in Royal II. The retirees here who were represented, as we are statutorily allowed and perhaps obliged to do could not have been parties to the Royal decisions, they were placed in this unfortunate situation at that time.

And certainly as the Second Circuit has ruled in the Litton case, contract construction, collective bargaining contract construction is a particularly appropriate area in which to apply affirmative collateral estoppel.

[11] We have no factors which mitigate against the application of that doctrine in this case. The prior suit was vigorously litigated. There has been no change in the law.

The Fund has cited, I guess, in support of their argument that there has been some change in the law, the recent Eighth Circuit decision in Anderson versus the Cement Workers.

Well, Your Honor, the collective bargaining agreement in that case was the cement workers' collective bargaining agreement. The contract that was being construed in that case was a contract which is not the contract before this Court.

All the Eighth Circuit did in Anderson is what every Court has been doing since Yardman and even before which is saying, the right of retirees to obtain health benefits for life is a question of contract construction. This contract has been construed. This contract is not the Anderson contract. The law has always been constant and there has been no change.

Again, one of the factors that the Supreme Court indicated should be regarded in determining the application of collateral estoppel is whether there [12] have been any inconsistent decisions with the decision before the Court.

We suggest there have been no such inconsistent decisions here. Again, Allied, as I have said before, is not inconsistent with the decision in Royal.

What the Court said in Allied is, "Mr. Employer, you had a contract obligation to find a successor when you sold your business, you had to make that purchaser your successor. Your failure to do so still obligates you, therefore, to provide the retirement benefits to the mine worker retirees."

Indeed, LTV is providing certain mine worker benefits based upon that decision.

Scarborough is not different. In that case again it was held that the employer had a continuing obligation to pay.

It was effective and presently applicable in the collective bargaining agreement. The employer was employing employees under that contract. The Court held the employer was obliged to pay.

There has been no decision holding that neither the employer nor the Fund is obliged to pay. There has been no decision which has undercut the [13] guarantees done in the collective bargaining agreement.

We believe that collateral estoppel ought to be applied. And as I have argued even if it weren't, the case is clear and the mine workers and the retirees they represent are entitled to Summary Judgment and a ruling by this Court that the Fund is obliged to provide the health benefits guaranteed such retirees for life.

Thank you.

MS. KATZ: Good afternoon, Your Honor. Your Honor, LTV Steel and the mining companies support the United Mine Workers of America's Motion for Summary Judgment on its cross-claim.

If Your Honor finds that the retirees are entitled to receive benefits as of February 1, 1988, then the controlling case law, particularly the Royal Coal decision, which the Benefit Trust pursued through the Supreme Court, demonstrates that the Benefit Trust is and since February 1, 1988 has been obligated to make those payments.

In addition, Your Honor, for all the reasons set forth by Ms. Millman and set forth in the papers, the Benefit Trust is collaterally estopped [14] from denying its liability for these payments since February 1, 1988.

Thank you.

MR. HANRAHAN: Good afternoon, Judge Lifland.

I wish to begin by apologizing to the Court that we did not have our papers to you sooner today. I realize that you have not had more than a few hours with them.

THE COURT: I got them. I was able to go through them and read them thoroughly, Mr. Hanrahan. I justified my faith in your ability to turn out a complex and comprehensive document.

MR. HANRAHAN: Let—

THE COURT: It might be editorializing further with respect to the contents of your brief, but it caught my attention very early in the brief.

I think your almost lead in sentence is one that is what could be called a foot stamper. I am sorry, the second sentence. It didn't take you long to say that the entire Fourth Circuit is capable of being patently misguided.

I rather doubt that you would make that statement in the Fourth Circuit.

[15] MR. HANRAHAN: I suspect that I might if the occasion were to arise.

Judge Lifland, I appreciate that you have had an opportunity to review the papers. I do not wish to take up an extraordinary amount of this Court's time.

You have seen our arguments with respect to the application of the Robinson decision, other decisions following it in this and other circuits to explain why we believe the Fourth Circuit was incorrect.

You have also seen our explanation about the change in the plan document which governs eligibility in 1984, which was adopted after the Fourth Circuit had for the first time several months before ruled that employers have no obligation after the expiration of their collective bargaining agreement.

We submit that the premise for the Royal II decision, which is that it's necessary to ignore the liberal terms of the plan document because the parties could not have anticipated how the Court would rule on the question of employer liability is simply contrary to the sequence of events.

[16] We have also attempted to submit to you what we had available since Monday with respect to bargaining history regarding the '74 negotiations leading to the adoption of the plan document that is relevant to this proceeding.

We have also indicated that there is other evidence that we have not been able to present before today's hearing.

In that same regard we have pointed out that the question of collateral estoppel and the exceptions to that doctrine, offensive use of collateral estoppel turn on a number of different factors, one of them is the opportunity for the Plaintiff, asserting collateral estoppel, to have joined in the earlier action.

We have presented some evidence that they did have that opportunity. There is more evidence which we did not have available today.

We have also relied on the Scarborough decision as an inconsistent decision. It is inconsistent very fundamentally with the Royal II case in that it says here is a situation where the retirees do not get paid.

The Fourth Circuit viewed it that this [17] was, I think the term, a seamly garment which has been torn by this definition of no longer in business.

I submit to you that the Scarborough case is fundamentally inconsistent with that. There was a decision where no one was paid benefits.

Perhaps more to the point, the Court observed that there are four requirements under the plan document and the employer must satisfy all four of those requirements in order to make beneficiaries eligible.

There is one other point that I would like to draw to your attention with respect to the '88 collective bargaining agreement.

Again, at the moment I have no affidavit to support this assertion; however, I would advise the Court that the outcome of the '88 collective bargaining agreement was to set a contribution rate to the '74 Plan, that is barely sufficient if at all to provide benefits to the existing population as it stood back at the end of January of this year. That rate of contribution is, I think, inconsistent with the view that the collective bargaining parties have seen their intent properly manifested in the Royal [18] Coal decision.

If it were, they would have taken account of the several thousand claims that have been asserted since the initial decision in Royal, and presumably made appropriate provision for the payment of benefits.

They have not, and we now face a situation where it may well be that a year from now we will be litigating with one or more or perhaps all contributing employers over the meaning of the guarantee clause.

The Trustees are quite concerned that we could reach a situation where we will be unable to pay benefits to anyone, existing people, the LTV group or anyone else—

THE COURT: How about lawyers?

MR. HANRAHAN: That is of concern to the Trustees as well.

That is also another reason why the application for collateral estoppel is inappropriate. It affects the rights of perhaps thousands of other people.

I will conclude my remarks with that, Judge Lifland. Thank you.

[19] THE COURT: Thank you, Mr. Hanrahan.

MS. HILLMAN: Unless the Court has questions, I think we have stated probably more than one occasion all the arguments.

THE COURT: Well, the provision at issue has been construed again and again and again. I have used a sufficient number of agains just taking into account Appellate decisions that I know of, District Court decisions and most recently that I know of my ruling, Bench ruling of August 1st. Is that the date?

MS. HILLMAN: Yes.

THE COURT: Essentially the issues here, as I alluded to on August 1st, were comprehensively covered in the Motion for Summary Judgment, partial Summary Judgment that was brought by LTV.

And I considered at that time and awaited to see if I was correct or not that the issue that's before me today was encompassed by my ruling of August 1st.

And having read all the papers and having listened to the arguments today, the authorities that have been placed before me, I do conclude that the Bench ruling of August 1st is dispositive of the [20] issue, not only of the Debtor's right to Summary Judgment on that portion of count one that sought declaratory relief that the Debtor was not required to make the payments, but is also dispositive of the rest of count one, in that based upon the authorities that have been cited that it is clear under especially Royal I and Royal II that it is the obligation of the Trust to make the payments.

So that I do incorporate fully the Bench ruling of August 1st, and I believe it's already been the subject of some degree of consideration or review in the District Court in the context of filed papers. Mr. Hanrahan, I just don't know which one but there are many.

I also in so holding recognize that I need not even get into the issue of collateral estoppel, offensive or otherwise, because I believe on the merits in the matter before me that the matter is totally dispositive, at least as far as the union's cross-motion is concerned.

But in reviewing the doctrine of collateral estoppel I do find that it's applicable here. This matter has been extensively litigated in other Courts. It is just about on all fours.

[21] The attempts by the Trust to show that there is a difference here from the matters considered by all of the Courts below the Fourth Circuit and above the Fourth Circuit amount to essentially hair splitting. And if I might be permitted and you may find me patently mis-

guided, Mr. Hanrahan, the hairs out of a wig, I think they are artificial, frankly, and I do find that the doctrine of collateral estoppel is very appropriate here.

Indeed, again it's not that I have any great empathy for a need to justify the dignity of the Fourth Circuit, but had this matter be raised in the same fashion in the Fourth Circuit I dare say you might have some concerns under Rule 11.

I will grant you that at least for the Second Circuit you need not have that concern nor in front of me.

I do find that there is, perhaps in your perception, some area where you might find it reasonable cause to sustain all of this activity, but I dare say it's been a very expensive trial for everybody over a very short period of time.

And I don't know that anybody can be adequately compensated for all of this activity. I [22] think it is indeed a burden. And I make these remarks not lightly but only because also in your very extensive brief early on, no, indeed on the same first page, Page 2 you violate the goose/gander rule.

You take into account the failure of the union to strictly adhere to procedural rules, the urgency at which the Order to Show Cause was raised at the hearing on August 1st, the failure to comply with local Rule 13(h), your careful putting out of all of these things totally ignored the fact that this Court entertained, perhaps against its better judgment, an Order to Show Cause based upon statements that were contained in the papers concerning activities that had already occurred:

Filing of a motion for withdrawal of the reference, service of pleadings or process upon other parties.

I recognize the urgency and I recognize the needs. Nevertheless, I granted the Order to Show Cause. But your colleague, who is sitting at your side, recognized that he was asking me to bend the rules somewhat, as the Court has an authority to do based upon some urgent situation.

Nevertheless, I find it unseemly that [23] having been given that kind of benefit in some fashion you seek to undermine the thrust of this motion today by seeking to get the union to adhere to a standard that you didn't necessarily feel applied to you.

There is a certain lack of grace about that, Mr. Hanrahan, and I would have ignored it totally except for the fact that right at the very beginning of your brief you highlight both of these elements.

Nevertheless, it is on the merits that I am ruling. It is on the fact that I have ruled based upon the extant authority, the coverage of the ruling on August 1st, the authorities cited in the briefs here, and I do hold that the collateral estoppel clause blocks you off at the pass.

I am therefore granting the Motion for Summary Judgment on the cross-claim and I find that the Fund or the Trust is obligated to provide the health benefits.

MS. HILLMAN: Is your Order on the record and I will submit a written Order tomorrow?

THE COURT: Yes, I suggest that you submit an Order granting the Summary Judgment and finding in your behalf.

[24] MS. KATZ: Your Honor, can we just have it clarified perhaps on the record that the Benefit Trust is directed to commence the payment of these benefits as of today's date?

I just want to add if Your Honor does put that on the record that there will be some administrative lag time—

THE COURT: I so direct and I will so order this record so Mr. Hanrahan, if you want something to appeal from forthwith you will have it.

It is so ordered.

MR. HANRAHAN: Thank you, Your Honor.

[25] CERTIFICATE

I, ROBERT PAYENSON, a Shorthand Reporter and Notary Public of the State of New York, do hereby certify:

That I reported the proceedings hereinbefore set forth and that the foregoing is a true record of the proceedings herein.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

/s/ Robert Payenson

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: CHATEAUGAY CORPORATION, REOMAR, INC.,
THE LTV CORPORATION, *et al.*,
Debtors

LTV STEEL COMPANY, INC., BCNR MINING CORPORATION,
NEMACOLIN MINES CORPORATION,
TUSCALOOSA ENERGY CORPORATION,
Plaintiffs

-vs-

JOSEPH P. CONNORS, SR., DONALD E. PIERCE, JR.,
WILLIAM MILLER, WILLIAM B. JORDAN and PAUL R.
DEAN, as Trustees of the UNITED MINE WORKERS OF
AMERICA 1974 BENEFIT PLAN AND TRUST, the UNITED
MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND
TRUST, and the UNITED MINE WORKERS OF AMERICA,
Defendants

Chapter 11

Case Nos. 86 B 11270 (BRL)
Through 86 B 11334 (BRL)
Inclusive, 86 B 11402 (BRL)
and 86 B 11464 (BRL)
Ad. Pro. No. 88-5502A

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT ON CROSS CLAIM

The UNITED MINE WORKERS OF AMERICA ("UMWA") having moved for an order declaring that JOSEPH P. CONNORS, SR., DONALD E. PIERCE, JR.,

WILLIAM MILLER, WILLIAM B. JORDAN and PAUL R. DEAN, as Trustees of the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST and the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST (1974 Benefit Plan) were obliged to pay health and life insurance benefits pursuant to the National Bituminous Coal Wage Agreement of 1984 (1984 Wage Agreement) for approximately eight hundred sixty-five (865) retirees whose last employer was BCNR MINING CORPORATION, NEMACOLIN MINES CORPORATION, or TUSCALOOSA ENERGY CORPORATION (the Mining Companies) if the Mining Companies were not obliged to pay for such health and life insurance benefits pursuant to the 1984 Wage Agreement; Judge Lifland of this Court having granted the UMWA's oral application for an order to show cause with respect to said motion and having set August 4, 1988 as the return date with respect to such order to show cause; and responsive papers having been filed; and the motion of the UMWA for summary judgment on its cross claim having been scheduled for hearing as set forth above and the hearing having been held before Judge Lifland of this Court on August 4, 1988; and Judge Lifland of this Court having issued from the bench an oral opinion granting the motion in its entirety; and after the deliberation and sufficient cause appearing therefore,

NOW, on motion of the UNITED MINE WORKERS OF AMERICA for summary judgment on its cross claim, it is hereby

DECLARED, ADJUDGED and DECREED that the 1974 Benefit Plan is obliged to pay for health and life insurance benefits pursuant to the 1984 Wage Agreement for all retirees represented by the UNITED MINE WORKERS OF AMERICA whose last employer was one of the Mining Companies for any and all periods of time commencing with the expiration of the 1984 Wage Agreement; and it is further

DECLARED, ADJUDGED and DECREED that the 1974 Benefit Plan is collaterally estopped from contesting its obligation as set forth above, and it is further

ORDERED that the 1974 Benefit Plan is required to immediately commence providing and paying for the health and life insurance benefits for the approximately eight hundred sixty-five (865) retirees represented by the UMWA whose last employer was one of the Mining Companies.

Dated: New York, New York

August 12, 1988

/s/ Tina L. Brozman
Chief United States Bankruptcy
Judge

STATUTES INVOLVED

PUBLIC LAW 100-334 [H.R. 2969]; June 16, 1988

RETIREE BENEFITS BANKRUPTCY PROTECTION ACT OF 1988

An Act to amend chapter 11 of title 11 of the United States Code to improve the treatment of claims for certain retiree benefits of former employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Retiree Benefits Bankruptcy Protection Act of 1988".

SEC. 2. RETIREE BENEFITS.

(a) BENEFITS.—Subchapter I of chapter 11 of title 11, United States Code, is amended by adding at the end thereof the following new section:

"§ 1114. Payment of insurance benefits to retired employees

"(a) For purposes of this section, the term 'retiree benefits' means payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.

"(b)(1) For purposes of this section, the term 'authorized representative' means the authorized representative designated pursuant to subsection (c) for persons receiving any retiree benefits covered by a collective bargaining agreement or subsection (d) in the case of persons receiving retiree benefits not covered by such an agreement.

"(2) Committees of retired employees appointed by the court pursuant to this section shall have the same rights, powers, and duties as committees appointed under sections 1102 and 1103 of this title for the purpose of carrying out the purposes of sections 1114 and 1129(a)(13) and, as permitted by the court, shall have the power to enforce the rights of persons under this title as they relate to retiree benefits.

"(c)(1) A labor organization shall be, for purposes of this section, the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, unless (A) such labor organization elects not to serve as the authorized representative of such persons, or (B) the court, upon a motion by any party in interest, after notice and hearing, determines that different representation of such persons is appropriate.

"(2) In cases where the labor organization referred to in paragraph (1) elects not to serve as the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, or in cases where the court, pursuant to paragraph (1) finds different representation of such persons appropriate, the court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, from among such persons to serve as

the authorized representative of such persons under this section.

"(d) The court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, to serve as the authorized representative, under this section, of those persons receiving any retiree benefits not covered by a collective bargaining agreement.

"(e)(1) Notwithstanding any other provision of this title, the debtor in possession, or the trustee if one has been appointed under the provisions of this chapter (hereinafter in this section 'trustee' shall include a debtor in possession), shall timely pay and shall not modify any retiree benefits, except that—

> "(A) the court, on motion of the trustee or authorized representative, and after notice and a hearing, may order modification of such payments, pursuant to the provisions of subsections (g) and (h) of this section, or
>
> "(B) the trustee and the authorized representative of the recipients of those benefits may agree to modification of such payments,

after which such benefits as modified shall continue to be paid by the trustee.

"(2) Any payment for retiree benefits required to be made before a plan confirmed under section 1129 of this title is effective has the status of an allowed administrative expense as provided in section 503 of this title.

"(f)(1) Subsequent to filing a petition and prior to filing an application seeking modification of the retiree benefits, the trustee shall—

> "(A) make a proposal to the authorized representative of the retirees, based on the most complete and

reliable information available at the time of such proposal, which provides for those necessary modifications in the retiree benefits that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

"(B) provide, subject to subsection (k)(3), the representative of the retirees with such relevant information as is necessary to evaluate the proposal.

"(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1), and ending on the date of the hearing provided for in subsection (k)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such retiree benefits.

"(g) The court shall enter an order providing for modification in the payment of retiree benefits if the court finds that—

"(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (f);

"(2) the authorized representative of the retirees has refused to accept such proposal without good cause; and

"(3) such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities;

except that in no case shall the court enter an order providing for such modification which provides for a modification to a level lower than that proposed by the trustee in the proposal found by the court to have complied with the requirements of this subsection and sub-

section (f): *Provided, however*, That at any time after an order is entered providing for modification in the payment of retiree benefits, or at any time after an agreement modifying such benefits is made between the trustee and the authorized representative of the recipients of such benefits, the authorized representative may apply to the court for an order increasing those benefits which order shall be granted if the increase in retiree benefits sought is consistent with the standard set forth in paragraph (3): *Provided further*, That neither the trustee nor the authorized representative is precluded from making more than one motion for a modification order governed by this subsection.

"(h)(1) Prior to a court issuing a final order under subsection (g) of this section, if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim modifications in retiree benefits.

"(2) Any hearing under this subsection shall be scheduled in accordance with the needs of the trustee.

"(3) The implementation of such interim changes does not render the motion for modification moot.

"(i) No retiree benefits paid between the filing of the petition and the time a plan confirmed under section 1129 of this title becomes effective shall be deducted or offset from the amounts allowed as claims for any benefits which remain unpaid, or from the amounts to be paid under the plan with respect to such claims for unpaid benefits, whether such claims for unpaid benefits are based upon or arise from a right to future unpaid benefits or from any benefits not paid as a result of modifications allowed pursuant to this section.

"(j) No claim for retiree benefits shall be limited by section 502(b)(7) of this title.

"(k)(1) Upon the filing of an application for modifying retiree benefits, the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and the authorized representative agree.

"(2) The court shall rule on such application for modification within ninety days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the authorized representative may agree to. If the court does not rule on such application within ninety days after the date of the commencement of the hearing, or within such additional time as the trustee and the authorized representative may agree to, the trustee may implement the proposed modifications pending the ruling of the court on such application.

"(3) The court may enter such protective orders, consistent with the need of the authorized representative of the retirees to evaluate the trustee's proposal and the application for modification, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

"(l) This section shall not apply to any retiree, or the spouse or dependents of such retiree, if such retiree's gross income for the twelve months preceding the filing of the bankruptcy petition equals or exceeds $250,000,

unless such retiree can demonstrate to the satisfaction of the court that he is unable to obtain health, medical, life, and disability coverage for himself, his spouse, and his dependents who would otherwise be covered by the employer's insurance plan, comparable to the coverage provided by the employer on the day before the filing of a petition under this title.".

(b) PLAN.—Section 1129 of title 11, United States Code, is amended by adding at the end of subsection (a) thereof the following:

> "(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.".

(c) TECHNICAL AMENDMENT.—The table of sections for subchapter I of chapter 11, title 11, United States Code, is amended by adding at the end thereof the following new item:

"1114. Payment of insurance benefits to retired employees.".

SEC. 3. CONFORMING AMENDMENTS.

(a) PUBLIC LAW 99-591.—(1) Section 608(a) of the second title VI of the joint resolution entitled "Joint resolution making continuing appropriations for the fiscal year 1987, and for other purposes", approved October 30, 1986 (Public Law 99-591; 100 Stat. 3341-74), is amended—

> (A) by striking "Notwithstanding" and all that follows through "Code" and inserting "(1) Subject

to paragraphs (2), (3), (4) and (5), and notwithstanding title 11 of the United States Code",

(B) by striking "until" and all that follows through "1987"; and

(C) by adding at the end thereof the following:

"(2) The level of benefits required to be paid by this subsection may be modified prior to confirmation of a plan under section 1129 of such title if—

"(A) the trustee and an authorized representative of the former employees with respect to whom such benefits are payable agree to the modification of such benefit payments; or

"(B) the court finds that a modification proposed by the trustee meets the standards of section 1113 (b)(1)(A) of such title and the balance of the equities clearly favors the modification.

If such benefits are covered by a collective bargaining agreement, the authorized representative shall be the labor organization that is signatory to such collective bargaining agreement unless there is a conflict of interest.

"(3) The trustee shall pay benefits in accordance with this subsection until—

"(A) the dismissal of the case involved; or

"(B) the effective date of a plan confirmed under section 1129 of such title which provides for the continued payment after confirmation of the plan of all such benefits at the level established under paragraph (2) of this subsection, at any time prior to the confirmation of the plan, for the duration of the period the debtor (as defined in such title) has obligated itself to provide such benefits.

"(4) No such benefits paid between the filing of a petition in a case covered by this section and the time a plan confirmed under section 1129 of such title with

respect to such case becomes effective shall be deducted or offset from the amount allowed as claims for any benefits which remain unpaid, or from the amount to be paid under the plan with respect to such claims for unpaid benefits, whether such claims for unpaid benefits are based upon or arise from a right to future benefits or from any benefit not paid as a result of modifications allowed pursuant to this section.

"(5) No claim for benefits covered by this section shall be limited by section 502(b)(7) of such title.".

(2) Section 608(b) of the second title VI of the joint resolution entitled "Joint resolution making continuing appropriations for the fiscal year 1987, and for other purposes", approved October 30, 1986 (Public Law 99-591; 100 Stat. 3341-74), is amended by inserting before the period the following: "and before the date of the enactment of the Retiree Benefits Bankruptcy Protection Act of 1988".

(3) Section 608 of the second title VI of the joint resolution entitled "Joint resolution making continuing appropriations for the fiscal year 1987, and for other purposes", approved October 30, 1986 (Public Law 99-591; 100 Stat. 3341-74), is amended—

(A) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively, and

(B) by adding at the end the following:

"(b)(1) Notwithstanding any provision of title 11 of the United States Code, the trustee shall pay an allowable claim of any person for a benefit paid—

"(A) before the filing of the petition under title 11 of the United States Code; and

"(B) directly or indirectly to a retired former employee under a plan, fund, or program described in subsection (a)(1);

if, as determined by the court, such person is entitled to recover from such employee, or any provider of health care to such employee, directly or indirectly, the amount of such benefit for which such person receives no payment from the debtor.

"(2) For purposes of paragraph (1), the term 'provider of health care' means a person who—

"(A) is the direct provider of health care (including a physician, dentist, nurse, podiatrist, optometrist, physician assistant, or ancillary personnel employed under the supervision of a physician); or

"(B) administers a facility or institution (including a hospital, alcohol and drug abuse treatment facility, outpatient facility, or health maintenance organization) in which health care is provided.".

(b) PUBLIC LAW 99-656.—Section 2 of the Act entitled "An Act to amend the interest provisions of the Declaration of Taking Act", approved November 14, 1986 (Public Law 99-656), is repealed.

SEC. 4. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) GENERAL EFFECTIVE DATE.—Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) APPLICATION OF AMENDMENTS.—The amendments made by section 2 shall not apply with respect to cases commenced under title 11 of the United States Code before the date of the enactment of this Act.

Approved June 16, 1988.

Section 608 of the second Title VI of the joint resolution entitled "Joint resolution making continuing appropriations for the fiscal year 1987, and for other purposes," Pub. L. No. 99-591, 100 Stat. 3341-74 (1986)

SEC. 608. (a) Notwithstanding any provision of chapter 11 of title 11, United States Code, the trustee shall pay benefits until May 15, 1987 to retired former employees under a plan, fund, or program maintained or established by the debtor prior to filing a petition (through the purchase of insurance or otherwise) for the purpose of providing medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death.

(b) This section is effective with respect to cases commenced under chapter 11, of title 11, United States Code, in which a plan for reorganization has not been confirmed by the court and in which any such benefit is still being paid on October 2, 1986, and in cases that become subject to chapter 11, title 11, United States Code, after October 2, 1986.

(c) This section shall not apply during any period in which a case is subject to chapter 7, title 11, United States Code.

11 U.S.C. § 1113

§ 1113. Rejection of collective bargaining agreements.

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protection that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the

debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

11 U.S.C. § 1114

§ 1114. Payment of insurance benefits to retired employees

(a) For purposes of this section, the term "retiree benefits" means payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.

(b)(1) For purposes of this section, the term "authorized representative" means the authorized representative designated pursuant to subsection (c) for persons receiving any retiree benefits covered by a collective bargaining agreement or subsection (d) in the case of persons receiving retiree benefits not covered by such an agreement.

(2) Committees of retired employees appointed by the court pursuant to this section shall have the same rights, powers, and duties as committees appointed under sections 1102 and 1103 of this title for the purpose of carrying out the purposes of sections 1114 and 1129(a)(13) and, as permitted by the court, shall have the power to enforce the rights of persons under this title as they relate to retiree benefits.

(c)(1) A labor organization shall be, for purposes of this section, the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, unless (A) such labor organization elects not to serve as the authorized representative of such persons, or (B) the court, upon a motion by any party in interest, after notice and hearing, determines

that different representation of such persons is appropriate.

(2) In cases where the labor organization referred to in paragraph (1) elects not to serve as the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, or in cases where the court, pursuant to paragraph (1) finds different representation of such persons appropriate, the court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, from among such persons, to serve as the authorized representative of such persons under this section.

(d) The court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, to serve as the authorized representative, under this section, of those persons receiving any retiree benefits not covered by a collective bargaining agreement.

(e)(1) Nothwithstanding any other provision of this title, the debtor in possession, or the trustee if one has been appointed under the provisions of this chapter (hereinafter in this section "trustee" shall include a debtor in possession), shall timely pay and shall not modify any retiree benefits, except that—

> (A) the court, on motion of the trustee or authorized representative, and after notice and a hearing, may order modification of such payments, pursuant to the provisions of subsections (g) and (h) of this section, or

(B) the trustee and the authorized representative of the recipients of those benefits may agree to modification of such payments.

after which such benefits as modified shall continue to be paid by the trustee.

(2) Any payment for retiree benefits required to be made before a plan confirmed under section 1129 of this title is effective has the status of an allowed administrative expense as provided in section 503 of this title.

(f)(1) Subsequent to filing a petition and prior to filing an application seeking modification of the retiree benefits, the trustee shall—

(A) make a proposal to the authorized representative of the retirees, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the retiree benefits that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (k)(3), the representative of the retirees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1), and ending on the date of the hearing provided for in subsection (k)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such retiree benefits.

(g) The court shall enter an order providing for modification in the payment of retiree benefits if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (f);

(2) the authorized representative of the retirees has refused to accept such proposal without good cause; and

(3) such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities;

except that in no case shall the court enter an order providing for such modification which provides for a modification to a level lower than that proposed by the trustee in the proposal found by the court to have complied with the requirements of this subsection and subsection (f): *Provided, however,* That at any time after an order is entered providing for modification in the payment of retiree benefits, or at any time after an agreement modifying such benefits is made between the trustee and the authorized representative of the recipients of such benefits, the authorized representative may apply to the court for an order increasing those benefits which order shall be granted if the increase in retiree benefits sought is consistent with the standard set forth in paragraph (3): *Provided further,* That neither the trustee nor the authorized representative is precluded from making more than one motion for a modification order governed by this subsection.

(h)(1) Prior to a court issuing a final order under subsection (g) of this section, if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim modifications in retiree benefits.

(2) Any hearing under this subsection shall be scheduled in accordance with the needs of the trustee.

(3) The implementation of such interim changes does not render the motion for modification moot.

(i) No retiree benefits paid between the filing of the petition and the time a plan confirmed under section 1129 of this title becomes effective shall be deducted or offset from the amounts allowed as claims for any benefits which remain unpaid, or from the amounts to be paid under the plan with respect to such claims for unpaid benefits, whether such claims for unpaid benefits are based upon or arise from a right to future unpaid benefits or from any benefits not paid as a result of modifications allowed pursuant to this section.

(j) No claim for retiree benefits shall be limited by section 502(b)(7) of this title.

(k)(1) Upon the filing of an application for modifying retiree benefits, the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and the authorized representative agree.

(2) The court shall rule on such application for modification within ninety days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the authorized representative may agree to. If the court does not rule on such application within ninety days after the date of the commencement of the hearing, or within such additional time as the trustee and the authorized representative may agree to, the trustee may implement the proposed modifications pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of

the retirees to evaluate the trustee's proposal and the application for modification, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(l) This section shall not apply to any retiree, or the spouse or dependents of such retiree, if such retiree's gross income for the twelve months preceding the filing of the bankruptcy petition equals or exceeds $250,000, unless such retiree can demonstrate to the satisfaction of the court that he is unable to obtain health, medical, life, and disability coverage for himself, his spouse, and his dependents who would otherwise be covered by the employer's insurance plan, comparable to the coverage provided by the employer on the day before the filing of a petition under this title.

99th Congress
2d Session

H.R. 5276

To prohibit certain companies who have filed for bankruptcy from discontinuing medical and life insurance benefits to retirees.

IN THE HOUSE OF REPRESENTATIVES

JULY 29, 1986

Mr. KEMP introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To prohibit certain companies who have filed for bankruptcy from discontinuing medical and life insurance benefits to retirees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. LTV Corporation, including all of its subsidiaries which were included in a bankruptcy petition filed, with a court, by such corporation pursuant to title 11, United States Code, shall continue to pay all medical and life insurance benefits to the retirees of such corporation or of any such subsidiary, as such payments are provided to be paid by such corporation pursuant to any agreement in which such corporation or subsidiary is a party. Such payments shall continue until such time as a court of competent jurisdiction orders the cessation of such payments.

SEC. 2. EFFECTIVE DATE.—The provisions of this Act shall be effective on July 25, 1986.

99th Congress
2d Session

H.R. 5283

To prohibit certain companies who have filed for bankruptcy from discontinuing medical and life insurance benefits to retirees.

IN THE HOUSE OF REPRESENTATIVES

JULY 29, 1986

Mr. STOKES (for himself, Ms. OAKAR, Mr. REGULA, Mr. MCCLOSKEY, Mr. SEIBERLING, Mr. MURPHY, Mr. PEASE, Mr. VISCLOSKY, Mr. ECKART of Ohio, Mr. FEIGHAN, Mr. BEVILL, Mr. FROST, Mr. RAHALL, Mr. NOWAK, Mr. TRAFICANT, Mr. KOLTER, Mr. WALGREN, Mr. CLAY, Mr. LAFALCE, Mr. MCDADE, Mr. HAYES, Mr. LIPINSKI, Mrs. COLLINS, Mr. OBERSTAR, Mr. ANNUNZIO, Mr. RUSSO, and Mr. ERDREICH) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To prohibit certain companies who have filed for bankruptcy from discontinuing medical and life insurance benefits to retirees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That LTV Corporation, including all of its subsidiaries which were included in a bankruptcy petition filed by such corporation in the United States Bankruptcy Court for the Southern District of New York pursuant to title 11, United States Code, shall continue to pay all medical and life insurance benefits to the retirees

of such corporation or of any such subsidiary, as such payments are provided to be paid by such corporation pursuant to any agreement in which such corporation or subsidiary is a party. Such payments shall continue until such time as a court of competent jurisdiction orders the cessation of such payments.

SEC. 2. The provisions of this Act shall be effective on July 25, 1986.

99th Congress
2d Session

S. 2690

To prohibit certain companies who have filed for bankruptcy from discontinuing medical and life insurance benefits to retirees.

IN THE SENATE OF THE UNITED STATES

JULY 25 (legislative day, JULY 21), 1986

Mr. METZENBAUM (for himself, Mr. HEINZ, Mr. BYRD, Mr. DURENBERGER, Mr. GLENN, and Mr. SPECTER) introduced the following bill; which was read the first time

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A BILL

To prohibit certain companies who have filed for bankruptcy from discontinuing medical and life insurance benefits to retirees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. LTV Corporation, including all of its subsidiaries which were included in a bankruptcy petition filed, with a court, by such corporation pursuant to title 11, United States Code, shall continue to pay all medical and life insurance benefits to the retirees of such corporation or of any such subsidiary, as such payments are provided to be paid by such corporation pursuant to any agreement in which such corporation or subsidiary is a party. Such payments shall continue until such time as a court of competent jurisdiction orders the cessation of such payments.

SEC. 2. EFFECTIVE DATE.—The provisions of this Act shall be effective on July 25, 1986.